BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
07/26/21
04:59 PM

Order Instituting Rulemaking Regarding Broadband Infrastructure Deployment and to Support Service Providers in the State of California	Rulemaking 20-09-001 (Filed September 10, 2020)

REPLY COMMENTS OF THE UTILITY REFORM NETWORK ON THE MAY 28, 2021 ASSIGNED ADMINISTRATIVE LAW JUDGE'S RULING

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July 26, 2021

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I. EXECUTIVE SUMMARY

The opening comments bring into focus the reality of digital redlining in California. The opening comments present data, analysis, discussion, and context that confirms that not all Californians have access to affordable and high-quality broadband services. The opening comments support the proposition that there are predictable patterns when considering the question of why that outcome is evident—namely, low income and rural areas of the state have been subjected to digital redlining. The opening comments further confirm that the root cause of these disparities can be attributed to the impact of digital redlining.

All consumer advocate parties agree that there is substantial evidence of digital redlining and a gaping digital divide that the Commission must act to close decisively.

- Parties including AARP, CETF, and CWA Cal Advocates, CforAT, EFF, & Public Knowledge, and Small Business Utility Advocates support the findings of the three studies discussed in the ALJ Ruling, as well as the Staff analysis in the ALJ Ruling's Table 1. Each agree that the studies and data demonstrate the existence of digital redlining, lack of investment, and the related market failures that have in turn had significant negative economic and social impacts on the digitally redlined communities.

- Comments by UCAN, Central Coast Broadband and CWA provide specific examples where small rural communities, even those just a few miles away from more lucrative and denser urban areas, are bypassed by providers with no regard to the impact these investment decisions have on the economic and social equity in these communities.

- Cal Advocates and CETF, and others, state that through the Digital Infrastructure and Video Competition Act (DIVCA) the Legislature created a clear and direct mandate for the Commission to support broadband deployment, affordability, and competition and to investigate and address discriminatory practices by statewide video franchise holders by their build-out and investment practices. TURN believes that there is no doubt that the Commission's work in this proceeding is fully supported by its federal and state authority to protect California consumers and to advance access to affordable and high -quality broadband services.

TURN agrees with these perspectives and believes that the record now provides strong support for the Commission to address California's demonstrated digital redlining problem. TURN joins with all consumer advocate parties who also urge the Commission to find that it has an obligation to address these inequities and to do so promptly.

Not surprisingly, the dominant firms in California's broadband industry, and their supporters, cannot see the digital redlining problem. This blind spot is rooted in what appears to be a failure to understand the connection between the historical underpinnings of redlining in industries such as banking and housing and the influence of those practices on investment decisions for broadband deployment that create the patterns of digital redlining in underrepresented and economically disadvantaged communities. Instead, the broadband ISPs take great pains to try to convince the Commission that their investment decisions and practices do not constitute digital redlining and that the Commission has no reason to continue to investigate, much less address through regulation, a digital divide caused by digital redlining, that these companies each say does not exist. Yet, none of the industry comments can explain away the data that clearly demonstrates an inequitable distribution of broadband investment that excludes these historically disadvantaged communities. The providers cannot answer the question, "if not digital redlining, then what is the root cause of the widely disparate outcomes that are clearly evident in the data?"

- Broadband ISPs like AT&T, Comcast, and Charter urge the Commission to adopt an overly narrow definition of digital redlining that would require intent to discriminate and a clear showing "racial animus" to rise to the level of digital redlining. These parties ignore evidence of discrimination based on the income levels of the targeted communities and clear data that rural areas of the state have also been digitally redlined.

- Broadband ISPs like Comcast and Charter suggests that the existence of a single broadband provider disproves digital redlining, failing to acknowledge that such a definition would leave vulnerable communities dependent on an unregulated

monopoly market and therefore subject to the whims of that provider. The cable broadband ISPs also take great care to downplay their own digital redlining practices associated with their lack of investment in rural areas of the state, and their unwillingness to compete against one another.

- The broadband ISPs and their supporters urge the Commission to find, erroneously, that monopoly and duopoly broadband markets are "good enough" to protect these communities from discriminatory practices, poor quality service offerings, and unaffordable rates. Instead, TURN urges the Commission to reject these attempts to narrow its inquiry and to see these constrained markets as a failure of deregulatory policies, and a result of digital redlining that must be addressed.

- AT&T and others advance high level claims that its wireline and wireless mobility service offerings provide equivalent home broadband services. Some broadband ISPs and their supporters assert that because low-income households are observed to rely exclusively on wireless mobility broadband that such an outcome is good enough. This perspective ignores clear evidence, supplied by the ongoing COVID-19 crisis, that wireless broadband services are not adequate substitutes for high quality wireline broadband. The broadband ISPs' insistence that wireless mobility services, and other inferior fixed wireless offerings are all that is needed by consumers serves to perpetuate the digital divide and the pernicious impacts of digital redlining. The Commission should reject specious arguments that wireless mobility are good enough for low-income families and find that such callous arguments do not consider the real needs of all Californians.

TURN urges the Commission to reject the tired arguments advanced by the broadband ISPs and their supporters that the digital divide is purely a problem of economics that can only be addressed by voluntary corporate "goodwill" that is supported by large government subsidies. Rather, the Commission must take decisive action to remedy the digital redlining problem.

In opening comments, *TURN advocates that digital redlining should be identified as occurring in areas where residents do not have two wireline broadband service providers that offer downstream broadband service speeds of at least 100 Mbps*.[1] This definition of digital redlining reflects the theme of many of the parties' opening comments and provides a consistent

[1] TURN July 2, 2021, Opening Comments at 1.

benchmark to identify underinvestment and a lack of competition that affects both urban and rural areas of the state.

TURN believes that its proposed definition of digital redlining will help the Commission identify and prioritize areas of the state that need attention. As TURN noted in opening comments, the Commission should prioritize solutions to redlining problems based on the following criteria.

Priorities for Correcting Digital Redlining	
1	Areas without broadband service at any speed.
2	Areas with a single broadband provider offering speeds less than 100 Mbps.
3	Areas with a single broadband provider offering speeds greater than 100 Mbps.
4	Areas with two broadband providers, one offering speeds above 100 Mbps; the other offering speeds below 100 Mbps.

- In addition to the speeds at which broadband has been deployed and the number of broadband ISPs providing service at those speeds, when setting priorities, the Commission should consider other factors, such as the persistent lack of investment by incumbent broadband ISPs that affect historically disadvantaged areas.[2] The lack of investment in infrastructure that characterizes digital redlining is one piece in the broadband universal service puzzle.

- The Commission should investigate other factors that can correlate with digital redlining, including those that can be readily quantified, such as demographics. However, the Commission must also consider factors that may not lend themselves as easily to data-driven identification, such as technical literacy, economic indicators, existence of anchor institutions, educational opportunities, and levels of public safety. Reviewing these types of factors should allow the Commission to identify and address government and private enterprise broadband deployment practices and policies that appear "race neutral" yet have disparate impact on communities of color, tribal communities, rural communities, low-income communities and other disaffected communities.

[2] TURN July 2, 2021, Opening Comments at 32-33.

- TURN also urges the Commission to consider issues associated with broadband affordability.[3] The Commission must also ensure that consumers have affordable broadband options at the 100 Mbps speed threshold.

- TURN believes that this Commission's authority under state and federal law to not only investigate matters of digital redlining and discrimination but to adopt rules, regulations, programs, and initiatives to address the impacts of these practices. TURN notes that the Commission has consistently found that it has authority to protect California consumers from discriminatory and harmful practices and, more specifically here, to "clos[e] the digital divide in California, and in bringing advanced communications services, including broadband internet access to all Californians."

- TURN rejects calls for narrowing Commission jurisdiction from the broadband ISPs and their supporters. This proposal is inapposite to DIVCA, the Commission's own precedent, and to the D.C. Circuit Court of Appeals decision in *Mozilla v. FCC.* The Commission itself has acknowledged that in Mozilla, the Court found a clear role for states to address market failures and consumer harm, especially in the vacuum left by federal deregulatory policies.

These reply comments will further address the issues raised in this summary and rebut the flawed arguments of the broadband ISPs and their supporters. The Commission must correct government and private enterprise broadband deployment practices and policies that appear "race neutral" yet have disparate impact on communities of color, tribal communities, rural communities, low-income communities, and other disadvantaged communities. TURN urges the Commission to promptly begin a data-driven process that finally fulfills the statutory objectives regarding the availability of high-quality, reliable, and affordable broadband services to all Californians.

[3] TURN July 2, 2021, Opening Comments at 29.

II. INTRODUCTION

Pursuant to the Assigned Administrative Law Judge's May 28, 2021, Ruling in R.20-09-001 ("ALJ Ruling" or "Ruling"),[4] The Utility Reform Network (TURN) hereby submits these reply comments. TURN's review of the opening comments did not reveal any surprises. As will be discussed in detail below, comments representing the incumbent broadband Internet Service Providers (ISPs), all of them among the dominant firms in California's broadband industry and their supporters, indicate that all is well in California's broadband marketplace and that the reality of digital redlining should be of no concern to the Commission. Invariably, however, these parties do not offer the Commission any compelling evidence that refutes the findings of the three studies that were the focus of the ALJ Ruling, or of the Commission's own Network Exam Study and cannot stand against the opening comments of parties like TURN and others. Instead, the broadband ISPs and their supporters rehash the mantra of the "free market" even as the failure of that approach is now abundantly clear from the shortfalls that emerged with the COVID-19 crisis[5]—it is now painfully obvious that all Californians do not have access to affordable and high-quality broadband services.[6]

In opening comments, TURN proposed a definition of redlining based on both the capabilities of broadband technology and the number of service providers offering useful data speeds in a given geographic area. Specifically, *TURN advocates that digital redlining should be identified as occurring in areas where residents do not have two wireline broadband service*

[4] Assigned Administrative Law Judge's Ruling, R. 20-09-001 (May 28, 2021) ("ALJ Ruling").

[5] Order Instituting Rulemaking, R.20-09-001 (September 10, 2020) at 6.

[6] TURN July 2, 2021, Opening Comments at 1.

providers that offer downstream broadband service speeds of at least 100 Mbps.[7] This definition of digital redlining provides a consistent benchmark to identify underinvestment and a lack of competition that affects both urban and rural areas of the state. Because broadband prices are not regulated by the Commission or by the FCC, consumers are left with "competition" as the only protection from abuses of market power. Yet, it is clear from the available data that broadband markets in California are characterized by little competition and are often monopoly or duopoly markets,[8] leaving consumers vulnerable to exploitive pricing practices, along with inadequate service offerings and poor service quality. TURN's definition of redlining is at least sufficient to ensure that consumers are not disadvantaged by only having a single choice for fixed broadband. In addition to adopting TURN's definition, the Commission should take other actions to ensure that the lack of competition in broadband market does not result in unaffordable broadband.

TURN believes that its proposed definition of digital redlining will help the Commission identify and prioritize areas of the state that need attention. As TURN noted in opening comments, the Commission should prioritize solutions to redlining problems based on the following criteria.

Table 1: Priorities for Correcting Digital Redlining	
1	Areas without broadband service at any speed.
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[7] TURN July 2, 2021, Opening Comments at 1.

[8] AARP July 2, 2021, Comments at 11; Central Coast Broadband Coalition Comments, p. 2; CETF July 2, 2021, Opening Comments, at 3; Charter July 2, 2021, Opening Comments, Brattle Study, at 28; CWA July 2, 2021, Opening Comments, unnumbered third page; Diversity Coalition July 2, 2021, Opening Comments at 8; TURN July 2, 2021, Opening Comments at 34 and 38.

In addition, when setting priorities, the Commission should consider other factors, such as the persistent lack of investment by incumbent broadband ISPs that affect historically disadvantaged areas.[9] The lack of investment in infrastructure that characterizes digital redlining is one piece in the broadband universal service puzzle. TURN also urges the Commission to consider issues associated with broadband affordability.[10] The Commission must also ensure that consumers have affordable broadband options at the 100 Mbps speed threshold.

While this reply will address many topics raised by various parties in the opening comments, our decision to not address a specific issue raised by a party should not be taken as a concession of the issue by TURN. As the Commission considers the comments and reply comments in this proceeding, TURN urges the Commission to keep a sharp focus on its statutory obligations and to rely on data-driven policy making.

III. DIGITAL REDLINING IS CLEARLY WITHIN THE SCOPE OF THE PROCEEDING

Cox incorrectly suggests that digital redlining is beyond the scope of this proceeding.[11] To support this contention, Cox argues that "the OIR did not state that the Commission would 'investigate' redlining, but rather stated the Commission's interest in considering 'the role of communications in serving all households in a community and concerns about digital redlining.'"[12] Cox's interpretation is incorrect. The December 28, 2020 Assigned Commissioner's Scoping Memo and Ruling (ACSMR) was issued following consideration of

[9] TURN July 2, 2021, Opening Comments at 32-33.

[10] TURN July 2, 2021, Opening Comments at 29.

[11] Cox July 2, 2021, Opening Comments at 2.

[12] *Id.*, quoting the OIR at 10.

comments and reply comments filed in response to the OIR.[13] Based upon consideration of the record, the ACSMR stated that digital redlining is within the scope of the proceeding.[14] Specifically, the ACSMR states:

> Phase III will investigate whether Internet service providers are refusing to serve certain communities or neighborhoods within their service or franchise areas, a practice called redlining and if so, which measures should be taken to mitigate or eliminate that practice.[15]

Further, as noted in the ALJ Ruling, the April 20, 2021 ACSMR revised the schedule and kept digital redlining in the scope, moving to Phase II-B of the proceeding.[16] Cox is clearly incorrect. Digital redlining is within the scope of this proceeding.

IV. INDUSTRY COMMENTERS MISUNDERSTAND THE HISTORICAL UNDERPINNINGS OF DIGITAL REDLINING

Some industry opening comments recognize the historical underpinnings of the concept and practice of redlining, specifically redlining in the California housing market.[17] Yet, to varying degrees, industry opening comments reflect a misinformed notion that the circumstances associated with digital redlining are not akin to, and should not be analyzed in the same way, as housing redlining.

For example, a set of industry commenters understand that "redlining" has roots in the housing and banking industries, but narrowly limit the practices they discuss to those that

[13] Assigned Commissioner's Scoping Memo and Ruling (ACSMR), December 28, 2020, at 2.

[14] *Id.*, at 4.

[15] *Id.*

[16] Ruling, p. 1; Assigned Commissioner's First Amended Scoping Memo and Ruling, April 20, 2021, at 7.

[17] *See e.g.,* AT&T July 2, 2021, Opening Comments at 27. Other industry commenters are silent on the issue entirely and suggest for the Commission to refrain from investigating. Cox July 2, 2021, Opening Comments at 8-10.

involve intentional discrimination based on income or race.[18] Comcast attempts to justify differences in service availability at particular speeds based on reasons that it claims do not warrant a "finding of *discrimination*," such as network upgrade or expansion work in progress, deployment costs, or operational factors.[19] Cox attempts to frame the inquiry more narrowly as being whether broadband providers are not offering broadband service to "all customers in the areas where they offer service."[20] AT&T goes as far as to say that redlining is a "highly-charged term" that is "not relevant to, and creates an unnecessary distraction."[21] While Frontier makes the affirmative, but overly-simplistic, statement that it does not base its "broadband investment decisions on racial considerations."[22]

Industry party comments follow a predictable pattern. Industry parties deny the presence of, and their role in, any digital redlining based on the lack of intentionality to discriminate and the absence of "racial animus" in what most argue are purely economic decisions. CCTA says, "CCTA's members are not 'redlining,' under any definition of that term."[23] The Small LECs say, "the practice of 'digital redlining' cannot be ascribed to the Small LECs, who have a unique history and regulatory status that has fostered an inclusive corporate culture and a strong focus

[18] AT&T July 2, 2021 Opening Comments at 14-15, 27; Comcast July 2, 2021 Opening Comments at 22 (intentional "failure to serve, or serve at adequate levels, based on income"); Charter July 2, 2021 Opening Comments at 3-4 ("intentional discrimination in deployment of broadband services (and enhancement to those services, such as speed upgrades) based on income and/or race"); Frontier July 2, 2021 Opening Comments at 1-2 (references the California Digital Infrastructure and Video Competition Act of 2006, requirement that a service provider not discriminate against any group based on its income).

[19] Comcast July 2, 2021, Opening Comments at 21. Relatedly, Comcast takes the step to question the need to formally define "redlining" and the purpose that a definition would serve. Comcast July 2, 2021, Opening Comments at 22, 29; CCTA July 2, 2021, Opening Comments at 8 ("[c]able broadband providers do not deny broadband service to customers based on race or income").

[20] Cox July 2, 2021, Opening Comments at 7.

[21] AT&T July 2, 2021, Opening Comments at 1.

[22] Frontier July 2, 2021, Opening Comments at 3.

[23] California Cable and Telecommunications Association, July 2, 2021, Opening Comments, at 4.

on universal service regardless of demographic factors."[24] Frontier states that it, "disagrees that the primary cause of any digital divide is racial animus or aversion to customers in rural areas. Instead, the more obvious explanation is economics."[25] And AT&T says, "The term "redlining" is a loaded term with a specific history in other industries that typically implies animus and intentional discrimination on the basis of income or race. AT&T objects to such a practice in any industry."[26] Even the Advanced Communications Law and Policy Institute at New York Law School, despite their self-described focus on "rational policies" regarding broadband connectivity, presents a constrained and past-tense context for redlining as a "heinous set of practices used decades ago to intentionally discriminate against people based on their race"[27] and also claim that viewed against what they call a "historical backdrop" it seems "inappropriate" to use the term redlining here.[28] These parties adhere to definitions that are far too rigid and myopic to adequately capture the concept and impact of digital redlining. As noted in TURN's opening comments:

> [D]igital redlining . . . [occurs] in areas where residents do not have two providers of wireline broadband services that offer downstream services of at least 100 Mbps. Digital redlining recognizes the role redlining practices and the other strategies used to create, enforce, and perpetuate racial segregation have played in creating and exacerbating the racial and economic inequalities the Commission now strives to dismantle. Light-touch broadband regulation at the federal, state, and municipal levels have fostered the environment in which broadband ISPs deploy infrastructure seemingly "race-neutral," yet, in practice, have disparate impacts on communities of color—especially Black communities. . . . Disparate impacts exist even when the *intent* of a policy is race-neutral, but the *impact* is not. Therefore, to address Digital Redlining, the

[24] Small LECs, July 2, 2021, Opening Comments, at 2.

[25] Frontier July 2, 2021, Opening Comments at 2.

[26] AT&T July 2, 2021, Opening Comments at 27.

[27] Advanced Communications Law & Policy Institute at New York Law School July 2, 2021, Opening Comments at 2 ("ACLPI").

[28] ACLPI July 2, 2021, Opening Comments at 3.

> Commission must act to address the impacts of the government and private actions in allowing these inequitable practices to develop and persist."[29]

In contrast, consumer advocates all work to provide an updated definition specific to *digital* redlining that adequately captures the impact that historical redlining in real estate has had on current access, deployment, and adoption of broadband services.[30] For example, California Emerging Technology Fund differentiates explicitly between *redlining* as an intentional, racially discriminatory practice in real estate and home loaning versus *digital redlining* as defined by privacy scholar, Dr. Chris Gilliard:

> "The creation and maintenance of tech practices, policies, pedagogies, and investment decisions that enforce class boundaries and discriminate against specific groups". . . It can refer to practices that create inequities of access to technology services in geographical areas, such as when internet service providers decide to not service specific geographic areas because they are perceived to be not as profitable and thus reduce access to crucial services and civic participation. . . . [31]

All consumer advocate parties agree that there is, in fact, a digital divide we must act decisively to close. As discussed in TURN's opening comments analyzing the studies cited in the Ruling, addressing the digital divide requires consideration of supply-side investment and deployment realities along with demand-side issues such as barriers to adoption. A comprehensive and forthright review into industry practices of digital redlining is a necessary

[29] TURN July 2, 2021, Opening Comments at 6-7.

[30] Cal Advocates, July 2, 2021, Opening Comments, at 2; Central Coast Broadband Coalition July 2, 2021, Opening Comments at 2; CforAT, EFF, & Public Knowledge July 2, 2021, Opening Comments, at 12; Diversity Coalition July 2, 2021, Opening Comments, at 12; Next Century Cities July 2, 2021, Opening Comments, at 4; TURN July 2, 2021, Opening Comments at 30.

[31] CETF July 2, 2021, Opening Comments, at 9.

part of the work to "accelerate the deployment of and access to quality, affordable internet for all Californians."[32]

V. TURN AND OTHER PARTIES PROVIDE CONSISTENT RECOMMENDATIONS ON IMPORTANT ISSUES

The opening comments of TURN and other parties provide the Commission with a set of constructive and comprehensive recommendations to address digital redlining. For example, TURN and numerous other parties recommend that the Commission continue to investigate redlining practices.[33] Numerous parties, including TURN[34] encourage the Commission to utilize a data-driven approach to identify digital redlining.[35] These parties recommend that the Commission collect data on broadband availability, broadband speeds and prices, and demographic information regarding broadband availability and adoption. Consistent with TURN, many parties also identify statutory and policy foundations for the Commission to remedy digital redlining where it exists.[36] Like TURN, Cal Advocates also recommends that the

[32] OIR at p. 1.

[33] Cal Advocates July 2, 2021, Opening Comments, p. 2; Central Coast Broadband Coalition July 2, 2021, Opening Comments at 2; CforAT, EFF, & Public Knowledge July 2, 2021, Opening Comments, p. 12; Diversity Coalition July 2, 2021, Opening Comments, p. 12; Next Century Cities July 2, 2021, Opening Comments, p. 4; TURN July 2, 2021, Opening Comments at 30; UCAN July 1, 2021, Opening Comments, p. 3.

[34] TURN July 2, 2021, Opening Comments at 31.

[35] AARP July 2, 2021, Comments at 4 & 13; Cal Advocates July 2, 2021, Comments at 9; Central Coast Broadband Consortium July 2, 2021, Opening Comments at 7; CforAT, EFF, & Public Knowledge July 2, 2021, Opening Comments at 13; CWA July 2, 2021 Opening Comments at18th and 19th unnumbered pages; Diversity Coalition July 2, 2021, Opening Comments at 5-6; Next Century Cities July 2, 2021, Opening Comments at 4; Small Business Advocates July 2, 2021, Opening Comments at 5; UCAN July 2, 2021, Opening Comments at 10-16.

[36] AARP July 2, 2021, Comments at 6; Cal Advocates July 2, 2021, Opening Comments, p. 16; Central Coast Broadband Consortium July 2, 2021, Opening Comments, p. 5; CETF July 2, 2021 Opening Comments, p. 8; CforAT, EFF, & Public Knowledge July 2, 2021, Opening Comments, pp. 24-25; Diversity Coalition July 2, 2021, Opening Comments, p. 13; Small Business Advocates July 2, 2021, Opening Comments, p. 9; UCAN July 1, 2021, Opening Comments, p. 7.

Commission prioritize efforts to ensure that those communications service providers engaged in digital redlining in Environmental Justice and Social Justice communities remedy their practices.[37] Finally, like TURN, many parties highlight the importance of ensuring affordability in addition to availability when considering the patterns and rates of broadband adoption.[38] The record provides strong support for these recommendations.

A. There is Significant Support for the Methodology and Conclusions of the Three Studies

In opening comments TURN noted that the three studies[39] supported the proposition that digital redlining was a reality in California.[40] Other parties also reached the same conclusion. AARP, summarizing its assessment of the three studies, as well as the data provided by Staff in Table 1 of the ALJ Ruling, states "The findings in the Annenberg Report are sobering and consistent with the other two reports' findings (as well as the data that the Commission's

[37] Cal Advocates Comments, p. 2. *Cf.* TURN July 2, 2021, Opening Comments at 32-33.

[38] AARP July 2, 2021, Comments at 3 and *passim;* Cal Advocates Comments, p. 16; CETF Comments, p. 12; CforAT, EFF, & Public Knowledge Comments, p. 26; CWA Comments, unnumbered 23rd page; Diversity Coalition Comments, p. 13; Next Century Cities Comments, p. 3; Small Business Advocates Comments, p. 9; TURN July 2, 2021, Opening Comments at 34; UCAN Comments, p. 4.

[39] TURN will refer to the following studies, which were identified in the ALJ Ruling, as the "three studies."

- Greenlining Institute, On the Wrong Side of the Digital Divide (June 2020) https://greenlining.org/publications/online-resources/2020/on-the-wrong-side-of-the-digital-divide/
- Communications Workers of America and National Digital Inclusion Alliance, AT&T's Digital Redlining: Leaving Communities Behind for Profit (October 2020) https://www.digitalinclusion.org/wp-content/uploads/dlm_uploads/2020/10/ATTs-Digital-Redlining-Leaving-Communities-Behind-for-Profit.pdf
- Hernan Galperin, et al. USC Annenberg Research Network for International Communication and the USC Price Spatial Analysis Lab, Who Gets Access to Fast Broadband? Evidence from Los Angeles County 2014-17 (September 2019) http://arnicusc.org/wp-content/uploads/2019/10/Policy-Brief-4-final.pdf

[40] TURN July 2, 2021, Opening Comments at 8-21.

Communications Division analyzed)."[41] CETF also finds that the three studies provide useful information on the nature of the digital divide in California,[42] as does CWA.[43] Similarly, Cal Advocates finds that the three studies provide valuable perspective on the state of broadband deployment in California:

> These three studies provide evidence that communications service providers have not made comparable investments in offering and upgrading broadband services in areas with specific demographic characteristics, notably low-income areas. The studies provide valuable insights on the disparities in broadband deployment at varying geographical scales, as well as the negative impacts that an absence of necessary infrastructure, high prices of broadband service, or poor service quality have on the academic success and career advancement of those without adequate broadband service.[44]

Center for Accessible Technology, the Electronic Frontier Foundation, and Public Knowledge also conclude that the three studies show compelling evidence of digital redlining:

> Individually and combined, the studies indicate disparate access to high-speed, reliable broadband not only for low-income consumers but also for communities of color. The discriminatory impacts of ISPs' failure to serve low-income communities and communities of color results from redlining and other historical discriminatory practices. ISPs' failure to deploy broadband in low-income communities and communities of color, especially Black and tribal communities, has replicated and perpetuated discrimination against those communities. These outcomes are not only appalling and profoundly unjust but also deprive those communities of economic, health and educational opportunities. The disparate impact of ISPs' deployment decisions perpetuates the effects of redlining, including disinvestment in historically redlined, unserved, and underserved communities in favor of wealthy communities, and therefore expands the digital divide.[45]

Small Business Utility Advocates (SBUA) indicates that the three studies "demonstrate the market failures in critical infrastructure availability—specifically, the lack of equitable broadband access in rural communities, low-income communities, Black communities,

[41] AARP July 2, 2021, Comments at 6.

[42] CETF Comments, pp. 2-5.

[43] CWA Comments, unnumbered first page.

[44] Cal Advocates Comments, p. 3.

[45] CforAT, EFF, Public Knowledge Comments, pp. 3-4.

Indigenous communities, and other communities of color" and that, "Businesses in these historically excluded communities are suffering." [46] Upon review of these compelling comments and analyses along with consideration of its own thorough review, TURN continues to believe that the three studies provide valuable insight into the problem of digital redlining in California.

Not surprisingly, broadband ISPs and their supporters offer an alternative, negative interpretation of the three studies. TURN will respond to the broadband ISP comments on the three studies later in this reply.

B. Among Parties other than Broadband ISPs, there is Consistent Support for the Staff Analysis Shown in Table 1 of the ALJ Ruling

In opening comments TURN found that the information provided in Table 1 of the ALJ Ruling, as well as the additional data underlying Table 1, supported the proposition that digital redlining exists in California. TURN also conducted a regression analysis using the data underlying Table 1 and found positive correlation between the percent of households served in a geographic area and the income level in the geographic area, controlling for density and the number of anchor institutions.[47] This analysis lends further support to the reality of digital redlining in California.

Other parties also found Table 1 in the ALJ ruling to be useful for evaluating digital redlining. AARP states that "The data collected, analyzed, and reported by the CPUC Communications Division provide an excellent foundation for examining where California should focus its efforts to achieve digital equity."[48] Like TURN,[49] AARP also recommends that

[46] Small Business Advocates Comments, p. 2.

[47] TURN July 2, 2021, Opening Comments at 22-24.

[48] AARP July 2, 2021, Comments at 15.

[49] TURN July 2, 2021, Opening Comments at 24.

the Commission expand the analysis behind the ALJ Ruling's Table 1 to include additional demographic data.[50] National Diversity Coalition makes a similar recommendation.[51] CETF states that it is "deeply troubled" by the data contained in Table 1 and its implications."[52] TURN believes that the Commission should expand the analysis behind Table 1 and make data sources available to all parties.

C. The Comments Demonstrate that Redlining Impacts both Urban and Rural Areas of California

The comments of non-industry parties make it clear that the Commission should take an expansive view of the redlining problem not only in urban areas but consider *both* urban and rural areas in its investigation and data analysis. Cal Advocates, for example, explicitly indicates that the three studies show evidence that digital redlining is occurring in both urban locations and rural locations.[53] SBUA also identifies the "lack of equitable broadband access in rural communities," as well as in other historically disadvantaged areas.[54] CWA notes that AT&T prioritizes network upgrades to wealthy urban neighborhoods "to the detriment of low income and rural communities."[55] CETF indicates that "The imperative is for the Commission to adopt regulations that will significantly accelerate deployment and adoption in low-income poor communities and rural areas without delay." Diversity Coalition focuses on impacts on rural areas and notes that "rural Americans are much more likely to have lower income levels and end

[50] AARP July 2, 2021, Comments at 19.

[51] National Diversity Coalition Comments, p. 10.

[52] CETF Comments, p. 11.

[53] Cal Advocates Comments, p. 9.

[54] Small Business Advocates Comments, p. 2.

[55] CWA Comments, unnumbered 10th page.

up on the wrong side of the digital divide."[56] Next Century Cities also describes the consequences of the lack of investment in rural areas:

> Rural communities, especially agricultural communities, rely on high-speed broadband access to improve their business practices but, as a result of digital redlining, can be forced to operate on substandard connections. Even households with connections in their areas often lack access to comparable services and pay higher prices.[57]

AARP also notes the importance of recognizing the impact of redlining on rural areas:

> Achieving digital equity requires addressing the rural-urban digital divide: Residents of rural areas are less likely to adopt high-speed internet access: 77 percent and 79 percent of urban and suburban households, respectively, have adopted high-speed internet access, in stark comparison with the 72 percent of rural households that have high-speed internet access in the home.[58]

Central Coast Broadband Consortium (hereinafter, "Central Coast") provides an analysis that clearly shows the digital redlining that occurs in rural areas of California. Central Coast identified census blocks that are wholly or partially within a DIVCA franchise area associated with Charter Communications where Charter does not offer broadband service. Overall Central Coast found that over 250,000 housing units and 624 anchor institutions were redlined by Charter.[59] Central Coast also examined income levels in communities that Charter continues to serve with analog cable systems, which are incapable of delivering broadband services.[60] Central Coast found that cities like Soledad, Gonzales, King City, and Greenfield had much lower income levels than cities where Charter upgraded to digital cable with the capacity to deliver meaningful broadband speeds.[61]

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[56] Diversity Coalition Comments, p. 5.

[57] Next Century Cities Comments, p. 10.

[58] AARP July 2, 2021, Comments at 3.

[59] Central Coast Comments, pp. 8-9.

[60] Central Coast Comments, p. 10.

[61] Central Coast Comments, p. 11.

UCAN provides an analysis of broadband deployment in San Diego County. Outside of the dense urban areas in San Diego County, UCAN finds that the availability of broadband service is diminished.

> Small rural areas, including low-income communities, are, not surprisingly, less likely to be served than other parts of San Diego County. The "redlining" is likely the consequence of broadband providers' focus on maximizing their returns on investment – small populations translate into low subscriber revenues; sparsely populated areas are often costly to serve because they are in remote and challenging terrains. High costs and low revenues translate into providers bypassing rural communities.[62]

The data is clear that digital redlining is a fact of life in rural areas of California and solutions to the redlining problem crafted by the Commission must address broadband shortfalls in rural areas of the state.

D. The Commission Should Consider the Impacts of Redlining on Small Businesses

SBUA makes the important point that redlining practices also affect small businesses.[63] SBUA points out that many small businesses "are located in rural areas and historically excluded communities" and cites to data illustrating the disparate access to broadband experienced by commercial sites with fewer than 20 employees, compared to larger enterprises.[64] As the California State Assembly Committee on Jobs, Economic Development and the Economy (Committee) has recognized, these small firms provide jobs, tailor services to meet the needs of their communities, stimulate the inflow of revenue, serve as catalysts for neighborhood reengagement, revitalize neighborhoods that would otherwise have vacant storefronts and

[62] UCAN Comments, p. 11.

[63] Small Business Utility Advocates (SBUA), at p. 2, 3 and 5.

[64] Id., at p. 3.

provide role models for future entrepreneurs.[65] Small businesses and microenterprises provide a critical foundation for uplifting disadvantaged urban and rural communities. The Committee has also recognized that the Covid-19 pandemic has had an outsized impact on small businesses owned by people of color.[66] TURN agrees with the SBUA's conclusion that redlining affects small businesses and supports SBUA's proposal that the CPUC's investigation should address inequitable broadband deployment affecting small businesses; and include collecting and analyzing data regarding broadband service availability and small business needs.[67]

VI. THE COMMENTS OF BROADBAND PROVIDERS AND THEIR SUPPORTERS DO NOT DISPROVE THE REALITY OF DIGITAL REDLINING

As discussed above, TURN finds consistent support from the non-broadband-ISP parties for the proposition that digital redlining is a reality in California. Not surprisingly, the dominant firms in California's broadband industry, who frequently maintain monopoly or duopoly positions in their respective markets,[68] see the world differently. In general, these firms, and other parties who merely echo the broadband ISP perspective, essentially tell the Commission "Nothing to see here, please move on." TURN believes that the broadband ISPs and their supporters do not advance any convincing argument or evidence that digital redlining is not a fact in California. Furthermore, the broadband ISPs also fail to address the persistent market

[65] California State Assembly Committee on Jobs, Economic Development, and the Economy, February 23, 2021, Hearing, Small Businesses Drive the California Economy. https://ajed.assembly.ca.gov/content/small-businesses-drive-california-economy

[66] Id., Reports Addressing Covid-19 Impact on Small Businesses and Economic Recovery. https://ajed.assembly.ca.gov/content/reports-addressing-covid-19-impact-small-businesses-and-economic-recovery

[67] SBUA at p.4.

[68] See page 28 of the Brattle Study provided with Charter's Comments. The Brattle Study is discussed below.

failures associated with high prices for broadband in California, which results from the paucity of competition in broadband markets that exists in most areas of the state and that is deeply rooted in communities most impacted by digital redlining.

A. Comcast

Comcast's approach is similar to other cable providers and their supporters—these parties view digital redlining as being impossible as long as one broadband ISP is present.[69] Comcast goes on to erroneously suggests that the ALJ Ruling does not define redlining.[70] Yet, the ALJ ruling describes redlining as being associated with Internet service providers (ISPs) who are refusing to "serve certain communities or neighborhoods within their service or franchise areas, a practice commonly called redlining."[71] Comcast ignores this language and attempts to reframe redlining as an issue associated with income levels alone.[72] TURN agrees that income levels may be a factor that contributes to the existence of digital redlining,[73] however, other factors contribute as well, such as customer density, cable broadband ISP decisions to forgo competing against their cable rivals, or a "business" decision to not upgrade analog networks in lower income areas, as described by Central Coast and discussed elsewhere in these reply comments. TURN urges the Commission to consider redlining practices using a broad perspective and to ignore Comcast's call to focus on income alone.

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[69] Comcast Comments, pp. 2-3. "Thanks in large part to the cable industry, 95 percent of California households have access to fixed broadband at 100 Mbps download speeds, according to the Commission's own data…"

[70] Comcast Comments, p. 3.

[71] Comcast Comments, p. 2.

[72] Comcast Comments, p. 3. "To the extent the Ruling focuses on whether ISPs are 'refusing to serve' certain populations *based on income status*, that at least frames the inquiry in a concrete and measurable way." Emphasis added.

[73] TURN July 2, 2021, Opening Comments at 22-24, 43-44.

Comcast comments focus on the Greenlining study.[74] In response to that study, Comcast claims that it does not engage in digital redlining.[75] Like the other broadband ISPs, Comcast attempts to frame the digital redlining issue very narrowly, with Comcast's main focus being on the availability of Comcast broadband services within Comcast's legacy service areas. However, TURN notes that Comcast holds a statewide video franchise, and Comcast does not offer service on a statewide basis. Comcast specifically avoids the service areas of other cable providers, as well as most rural areas of the state.[76] It is clear to TURN that Comcast's policies of selecting certain urban areas and refusing to serve in rural areas, as well as refusing to compete against cable rivals contributes to the digital redlining problem in California. Communities in which Comcast, or any other cable company, refuse to serve face reduced infrastructure deployment and lower levels of competition, contributing to California's digital divide. While Comcast attempts to frame this reality as resulting from "non-controversial business considerations, such as deployment costs,"[77] the impact of these decisions is digital redlining, and these practices result in significant harm to Californians who lack access to broadband services or who face little or no broadband competition.[78] TURN does not believe that the mere disparity in deployment costs claimed by companies like Comcast should end the inquiry and wipe their hands clean on the matter of digital redlining.

[74] Comcast Comments, p. 5. "Comcast will respond primarily to the Greenlining Institute report titled On the Wrong Side of the Digital Divide … which is the only one of the three papers focused on Comcast's service area in central and northern California."

[75] Comcast Comments, p. 2.

[76] TURN July 2, 2021, Opening Comments at 43.

[77] Comcast Comments, p. 3.

[78] TURN July 2, 2021, Opening Comments at 34-35, *passim.*

Comcast states that it, and other cable providers "serve entire communities in California without regard to economic status." As illustrated in TURN's opening comments, CPUC data clearly shows that the state's major cable providers, Comcast, Charter, and Cox do not provide service to all areas of California, even on a combined basis.[79] TURN does not dispute that cable companies operate under local franchise arrangements that historically have resulted in widespread availability of cable service within those franchise areas. However, Comcast ignores the fact that it does not serve outside of those local franchise areas, especially in rural areas of the state. This lack of investment by Comcast and other cable operators contributes to the digital divide and disadvantages California's rural communities.

1. Comcast's Israel/Keating Declaration

Comcast's comments rely on a declaration prepared by Compass Lexicon economists Mark A. Israel and Bryan G. M. Keating (hereinafter Israel/Keating). The Israel/Keating declaration adopts Comcast's definition of digital redlining as an outcome that is only associated with broadband ISPs refusing to serve *based on the income level of an area alone*.[80] The Israel/Keating declaration states that the authors "observe no evidence of systemic redlining by ISPs in general in California—and no evidence of redlining by Comcast in particular in the state."[81] As noted above, there is more to redlining than income.

While relying on the narrow income-based definition of digital redlining, Israel/Keating do concede that income may influence the level of broadband deployment observed in

[79] TURN July 2, 2021, Opening Comments at 43.

[80] "redlining refers to the practice of ISPs that "refus[e] to serve certain communities or neighborhoods within their service or franchise areas," *particularly on the basis of income.*" Israel/Keating Declaration, ¶13, p. 5, emphasis added.

[81] Israel/Keating Declaration, p. 6.

California. Israel/Keating describe a scenario where rural areas of California have both lower incomes and higher deployment costs than urban areas and thus are likely to see lower levels of investment.

> If one were to perform an analysis of income and deployment in the two regions, one would find a positive correlation between income and deployment: The region with higher income (and lower deployment costs) will tend to have the newest technologies deployed first. But, of course, this does not mean that lower income is the reason for slower deployment in other areas. Instead, both deployment decisions and income are correlated with costs of deployment.[82]

To Israel/Keating, the potential for correlation between deployment costs and income washes Comcast's hands of engaging in digital redlining. But this is only because of their narrow definition of redlining focused on income, which ignores both common sense and the language in the ALJ Ruling. The ALJ Ruling states that answers are sought regarding "whether Internet service providers (ISPs) are refusing to serve certain communities or neighborhoods within their service or franchise areas, a practice commonly called redlining."[83] TURN notes that Israel/Keating's observation that "deployment decision and income are correlated with the costs of deployment" identifies one confluence of factors that result in digital redlining, but there may be many others. Importantly, Israel/Keating concede that the areas cable companies exclude from their service territories, through explicit policies that avoid serving rural areas, will never see the "newest technologies"[84] deployed. That certainly seems like digital redlining to TURN.

Israel/Keating go on to state that to solve the problem of teasing out whether or not redlining is based on income alone, "the relevant question is whether broadband availability

[82] Israel/Keating Declaration, p. 8.

[83] ALJ Ruling, p. 1.

[84] Israel/Keating Declaration, p. 8.

depends on income *after controlling for all other factors that may affect deployment*."[85] While TURN does not agree that the only "relevant question" is whether broadband availability depends on income, TURN certainly agrees with Israel/Keating that other factors must be controlled for when evaluating the individual influences of factors that may contribute to digital redlining. This is why TURN utilized the data available with the ALJ ruling's Table 1 to test the proposition that broadband deployment is correlated with incomes, but also other factors such as customer density, and the presence of anchor institutions.[86] While TURN's regression analysis does not include "*all* other factors that may affect deployment," the results of TURN's analysis suggest that even when controlling for customer density,[87] as well as the presence of anchor institutions, income levels within the communities being reviewed correlate with the company's decision whether to invest in that community, at a high level of statistical significance.

As TURN noted in opening comments, the strength of this conclusion could be improved by adding more data to control for other potential influences on broadband deployment,[88] which is also suggested by Israel/Keating.[89] While it is unlikely that "all other factors that may affect deployment" lend themselves to statistical analysis (i.e., data on factors suggested by Israel/Keating such as "workforce challenges"[90] may be difficult to quantify), the Commission

[85] Israel/Keating Declaration, p. 9, emphasis in the original.

[86] TURN July 2, 2021, Opening Comments at 22-24.

[87] Comcast Comments, p. 21. (Comcast concedes density is correlated with deployment costs, "…an appropriately framed study of redlining must control for cost of deployment (primarily driven by geography and/or lower population density)…"

[88] TURN July 2, 2021, Opening Comments at 24.

[89] Israel/Keating Declaration, p. 9.

[90] Israel/Keating Declaration, p. 9.

should not let "perfect be the enemy of good" on this matter.[91] TURN's regression analysis suggests that even when controlling for customer density and anchor institutions that broadband deployment is correlated with income levels, i.e., lower income areas are less likely to have 100 Mbps broadband available. Adding additional measurable variables to the Staff's data set, such as demographic factors, would shed additional light on the matter. Until that data becomes available, the Commission can rely on the data underlying Table 1, and TURN's regression analysis, to support the proposition that, contrary to the claims made by Israel/Keating, there is a connection between broadband deployment, customer density, customer income, and the presence of anchor institutions at a reasonable level of statistical confidence.[92]

2. Summary: Comcast and the Israel/Keating Declaration do not Contradict Digital Redlining

Comcast claims that "Objective data show that high-quality broadband is broadly available in California and do not support assertions that ISPs are systematically refusing to serve certain communities or neighborhoods."[93] However, this assessment is based on an overly narrow examination of the data and a flawed understanding of digital redlining. Comcast and Israel/Keating ignore the impact of Comcast's decisions to refrain from competing against its cable rivals or to serve rural areas of the state. Comcast and Israel/Keating also ignore the lack of investment in Comcast's service area by ILECs, including California's largest ILEC AT&T,

[91] Israel/Keating are also critical of the fact that the data associated with Table 1 is only capable of deriving "average" customer density for each geographic area. (Israel/Keating, p. 12). Here too, perfect should not be the enemy of good and the Commission should recognize that even when controlling for average density that broadband deployment is still negatively correlated with income.

[92] It is notable that while the Israel/Keating Declaration analyzes the data in the ALJ Ruling's Table 1, they do not report the results of any regression analysis, such as the one conducted by TURN, that would allow them to shed light on "the relevant question (of) whether broadband availability depends on income after controlling for all other factors that may affect deployment."

[93] Comcast Comments, p. 29.

which results in broadband monopoly for many Californians, especially at higher data speeds.[94] Comcast's comments and the Israel/Keating declaration, do not undermine any element of TURN's opening comments, nor do they present any compelling reason as to why the Commission should not continue its investigation into digital redlining practices.

B. Charter

Charter focuses on the 2019 Annenberg study, and limits its analysis to Los Angeles County.[95] Thus, Charter ignores the larger questions of Charter's other service areas, areas where Charter does not serve, what other broadband providers are doing, and how the actions of those firms may affect investment and digital redlining.

Charter expends considerable effort to demonstrate that Charter has deployed broadband throughout its legacy service area, and especially to a large portion of Los Angeles County.[96] Charter then uses this fact in an attempt to undermine the 2019 Annenberg study. Charter is critical of the 2019 Annenberg study, specifically regarding an alleged conflation of the number of wireline competitors with the quality and desirability of broadband services. Charter states:

> The absence of a third (or fourth or fifth) wireline provider in a given market, therefore, may often be a function of what the market can support, and should not lead to the implication that additional competitors are absent because of discrimination. The 2019 USC Study ignores these kinds of considerations. Although it purports to control for competition intensity, it does not actually do the work of analyzing why there might be relatively fewer competitors in certain areas.[97]

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[94] See the discussion of Charter Communications' comments in the following section of this reply.

[95] Charter Comments, p. 4. "Charter's comments below focus primarily on the 2019 study published by USC Annenberg Research Network for International Communication and the USC Price Spatial Analysis Lab regarding FTTP deployments in Los Angeles County … The 2019 USC Study directly addresses broadband deployment in Los Angeles County, where Charter offers service to the vast majority of county residents (and virtually ubiquitously in its franchised service area) and has deployed gigabit service throughout its footprint in the county."

[96] Charter Comments, pp. 7-12 and attached Brattle Study, *passim.*

[97] Charter Comments, p. 24.

Charter's criticism appears to be based on a failure to thoroughly read the 2019 Annenberg study. That study, as well as its 2021 update,[98] does analyze why there might be relatively fewer competitors in certain areas, specifically focusing on the impact of race and income levels.[99] As will be discussed further below, other factors may also contribute to digital redlining, factors that are recognized by Charter's consultant, the Brattle Group.

1. Charter Ignores the Impact of the Lack of Competition on Digital Redlining

Like Comcast, Charter considers digital redlining to be an impossibility as long as at least one firm offers broadband in a specific geographic area.[100] As a result, Charter fails to discredit the 2019 Annenberg study precisely because the Annenberg study did not limit its analysis to whether or not a single broadband firm serves Los Angeles County. Rather, the Annenberg study focused on (1) fiber deployment, which provides valuable information regarding investment, especially the investment practices of companies other than cable companies, and (2) on the level of wireline broadband competition within Los Angeles County.[101] The 2019 Annenberg Study concludes that "broadband investments are not equally distributed across LA County."[102] Charter, and its associated study prepared by Brattle, simply ignore the Annenberg Study's data and analysis and proceed as if the only matter at hand for the Commission is whether or how Charter has deployed its Hybrid Fiber Coaxial (HFC) network in its legacy

[98] Hernan Galperin, et al., "Who gets access to fast broadband? Evidence from Los Angeles County, *Government Information Quarterly*, (July 2021) https://www.sciencedirect.com/science/article/abs/pii/S0740624X21000307

[99] 2019 Annenberg Study, p. 2; 2021 Annenberg Study, p. 3.

[100] Charter Comments, p. 4. "[T]he studies ignore the widespread deployment of high-speed broadband using last-mile technologies other than fiber-to-the-premises ("FTTP") (particularly hybrid fiber coaxial ("HFC") networks deployed by cable providers)…"

[101] 2019 Annenberg Study,

[102] 2019 Annenberg Study, p. 2.

service area, especially in Los Angeles County. While TURN applauds Charter's efforts to deploy broadband in the areas in which it serves, the questions associated with digital redlining posed by the ALJ Ruling are much more broad.

Charter indicates that it is unclear "how 'digital redlining' is meant to be defined."[103] As discussed above, TURN finds the ALJ Ruling to be crystal clear on this matter. Digital redlining arises when ISPs refuse to "serve certain communities or neighborhoods within their service or franchise areas, a practice commonly called redlining."[104] Like Comcast, Charter has a statewide video franchise and thus its existing service area reflects Charter's own decisions as to where to serve. Certainly, as Charter readily admits, "the divide between urban and rural areas is sizeable,"[105] and Charter's refusal to expand into rural areas of the state contributes to this digital divide. Charter's decision to avoid these rural areas has left large portions of the state without access to high quality broadband, as illustrated by its failure to upgrade its antiquated analog network in rural communities in the Salinas Valley, described by Central Coast.[106]

While Charter readily admits that there is a lack of choice in rural areas,[107] driven in part by Charter's unwillingness to invest in those rural areas due to the high cost of service,[108] Charter misses the point entirely when it comes to the analysis of Los Angeles County provided

[103] Charter Comments, p. 3.

[104] Comcast Comments, p. 2.

[105] Charter Comments, p. 13.

[106] Central Coast Broadband Consortium Comments, p. 9.

[107] Charter Comments, p. 13.

[108] Charter Comments, p. 16 "This result [the lack of investment in low-density areas] should be unsurprising given the basic economics of broadband deployment. Building out a broadband network requires significant capital investment. Once the necessary facilities are in place, the cost of serving additional customers in that area is relatively low, giving providers a strong incentive to sign up new customers. But for areas that are not already served, the fewer homes there are per mile in a given area, the less likely a provider will be able to recover the cost of deploying new facilities." (Footnotes omitted.)

with Charter's comments. Charter states that it provides widespread broadband in high-density urban areas of the County, with the potential to deliver high-speed broadband service. However, even in urban areas other broadband ISPs, especially AT&T, have not invested to enable the ubiquitous availability of broadband services with similar capabilities as Charter's. As a result, even duopoly markets for broadband at 100 Mbps are not ubiquitous in Los Angeles County, with almost a quarter of Los Angeles households facing a monopoly for service at that speed.[109] For higher broadband speeds, the monopoly problem is even more pronounced.[110]

2. Charter's Brattle Study

Like Comcast, Charter also provides a study to bolster its position that redlining is not occurring in California. The Brattle study "Understanding Broadband Deployment: A Case Study of Los Angeles County," (hereinafter, Brattle Study) takes on the analysis of digital redlining contained in the 2019 Annenberg study highlighted in the ALJ Ruling. Charter indicates that it directed Brattle to focus on Los Angeles where "Charter offers service to the vast majority of county residents (and virtually ubiquitously in its franchised service area) and has deployed gigabit service throughout its footprint in the county."[111] While TURN is pleased to hear of Charter's investment in Los Angeles County, TURN believes that Charter, and the Brattle Study, miss the point of the ALJ Ruling. The investment questions raised by the ALJ Ruling extend beyond whether a single company has invested in a geographic area. The ALJ Ruling expresses concerns regarding evidence of competition (or the lack thereof) specifically pointing to compliance with the state-wide franchise framework included in the Digital

[109] See Charter's Brattle Group Study, p. 28.

[110] See, for example, Charter's Brattle Group Study, p. 28, Table 3.

[111] Charter Comments, p. 4.

Infrastructure and Video Competition Act.[112] TURN agrees that competition must be considered when evaluating digital redlining practices as broadband prices and service quality are not regulated and consumers depend on "market forces" to deliver affordable broadband.[113] Certainly, the presence of one broadband ISP in a service area, i.e., a monopoly, does not provide competition sufficient to ensure that market forces are protecting consumers.

Regarding the matter of competition, while TURN does not believe that a two-provider market (i.e., duopoly) results market competition that is sufficient to protect consumers, TURN believes that all Californians should *at least* have that degree of choice. This perspective is also supported by the Brattle Study which states that "competition can develop between two, or a few networks."[114] Certainly, the more the better, but the lack of investment by broadband ISPs, either associated with ILECs within their traditional franchise areas, or by cable companies outside of their traditional franchise areas, is preventing many California households from having the ability to choose from even two alternative wireline broadband networks.

3. The Brattle Study Overlooks Important Evidence of "Cherry Picking"

The Brattle Study faults the Annenberg Study for finding that providers engage in "cherry picking" even in neighborhoods where broadband ISPs decide to invest.[115] When rebutting the claims of "cherry-picking," the Brattle Study does not consider the number of service providers or the affordability and subscription rates of the offered services, only whether Charter has made investments.[116] Thus, the Brattle Study does not consider the behavior of other

[112] ALJ Ruling, p. 3.

[113] TURN July 2, 2021, Opening Comments at 1.

[114] Brattle Study, p. 11.

[115] Brattle Study, pp. 16-17.

[116] Brattle Study, pp. 17-22.

firms that could have invested and offered competing broadband services in Los Angeles County. Certainly, because of the turf arrangements associated with cable companies, who refrain from entering one another's legacy franchise areas,[117] consumers at any specific location in Los Angeles County do not have the ability to choose from among multiple cable company options.[118] However, Charter could also be facing competition from AT&T in Los Angeles County if AT&T had made sufficient investment to keep up with Charter's gigabit broadband network. AT&T's failure to fully invest in a network and services in competition with Charter and others should be identified as AT&T "cherry-picking" the customers for which it has deployed fiber and is ready to compete.[119] Thus, a key question addressed by both the 2019 and 2021 Annenberg studies is the degree of competition facing consumers in Los Angeles County, especially fiber-based competition. Fiber is the only other broadband technology, other than the Hybrid Fiber-Coaxial (HFC) technology deployed by Charter in Los Angeles County,[120] that could provide a comparable broadband product. Charter's comments and the Brattle Study generally ignore the importance of competition and pay no attention to AT&T's broadband deployment practices, which are key to understanding the competitive landscape in Los Angeles County, and the presence of digital redlining by AT&T.[121]

[117] TURN July 2, 2021, Opening Comments at 43-44.

[118] TURN July 2, 2021, Opening Comments at 43-44.

[119] Charter Comments, pp. 2, 4.

[120] Charter Comments, p. 20.

[121] The Brattle Study provides no evaluation of AT&T investment practices, and mentions the AT&T only once, as it notes that the CWA & NDIA study focused on AT&T. Brattle Study, p. 6 and *passim.*

4. Charter and Brattle's Criticism of FTTP as a Proxy for Investment is Misplaced

Charter and Brattle are also critical of the use of the 2019 Annenberg study's focus on fiber-to-the-premises (FTTP) deployment as a proxy for investment.[122] Fiber deployment is a good indicator of investment, especially investments made by ILECs. Given that Charter has deployed gigabit fiber service "throughout its footprint,"[123] if competitors cannot match those data speeds, consumers will face a significant disadvantage in the marketplace, i.e., a monopoly market. Fiber investment by an ILEC provides a good proxy for a very important type of investment—an investment that will encourage competition by offering high-speed broadband services.

5. The Brattle Study's Criticism of the Methodology of the 2019 Annenberg Study is Flawed

On the matter of the methodology of the 2019 Annenberg Study, the Brattle Study finds flaws in three areas: (1) Annenberg's use of fiber deployment as a proxy for investment; (2) that the Annenberg study does not count cable and HFC providers, and (3) the Annenberg Study does not count investment made by fixed wireless providers.[124] Before addressing Brattle's criticism,

[122] Charter Comments, p. 19, Brattle Study, p. 27.

[123] Charter Comments, p. 4

[124] "First, deployment and upgrade of a broadband network is a direct measure of investment and no proxy is needed to measure this. Second, from the performance indicators, it is clear that in a majority of cases, especially in terms of speeds offered, HFC and fiber are seen as substitutes. An obvious implication is that if the presence or absence of a certain type of provider or the count of providers were to be used as a proxy for broadband investment then at the very least, cable and HFC providers should be counted along with the fiber providers and doing so would dramatically change the results. Third, using the presence of fiber providers as a broad investment proxy misses the investment by other fixed providers. For example, in areas where fixed wireless is available, such investment should also be counted when quantifying broadband investment in an area." Brattle Study, p. 27.

it is useful to consider Brattle's perspective on the "key economic forces driving broadband investment":

> [W]e believe it is useful to explain some of the key economic forces driving broadband investment. *Broadband is a classic capital intensive good. To provide a broadband service, a carrier needs to build a network before it can start offering service. All networks require significant capital investments before the first customer can be covered.*"[125]

Yet, the Brattle Study ignores these basic economic facts as it offers criticism of the Annenberg Study.

Brattle's first "criticism," that the study used fiber deployment as a proxy for investment even when "no proxy is needed," directly contradicts the statement that "all networks require significant capital investments before the first customer can be covered." Certainly, this is equally true for HFC or fiber networks. Annenberg did not have access to the books and records of broadband providers, but it did have access to data on ISP fiber-broadband deployments. According to Brattle's own principles "a carrier needs to build a network before it can start offering service," and building that network "require[s] significant capital investment." Thus, it is perfectly reasonable for Annenberg to use deployment of the network as a proxy for investment in the network and Brattle's first criticism is no criticism at all.

On the second point, Brattle again appears to misunderstand the 2019 Annenberg Study, which has a substantial focus on broadband competition.[126] Considering both HFC and fiber (as well as other fixed broadband technology platforms) would not change any of Annenberg's

[125] Brattle Study, p. 8, emphasis added.

[126] 2019 Annenberg Study, *passim.* The 2021 Annenberg study has a similar focus. See the discussion in TURN July 2, 2021, Opening Comments at 16-18.

results because the 2019 Annenberg Study already considers those technologies as it counts the number of competitors in Los Angeles County.[127]

Lastly, the Brattle Study is critical of an alleged "missing of other providers" by the 2019 Annenberg Study, including "fixed wireless providers." TURN notes that given that the 2019 Annenberg Study is focused on a major metropolitan area, it is unlikely that fixed wireless service would provide a viable alternative to wireline services. Fixed wireless services require line-of-sight transmission, which may be difficult to achieve in urban areas and requires location-by-location qualification for both a service connection, and for data speed availability.[128] Furthermore, given the lessons learned from the ongoing pandemic, TURN believes that high-quality and affordable broadband has become a basic human right. Therefore, any broadband offering claiming to fulfill that right must be equivalent to high-quality wireline broadband.[129] TURN has not seen evidence that wireless alternatives consistently provide this equivalency.

6. Contradicting Charter, the Brattle Study Identifies Multiple Factors that Can Result in Digital Redlining

Charter alleges that density is the driving factor associated with broadband deployment.[130] Charter even asserts that with regard to the ALJ Ruling's Table 1, which shows that lower incomes are associated with the lack of 100 Mbps broadband, "the *cause* is population density (and related deployment costs), not income level."[131] However, like Comcast, Charter (and Brattle) fail to use regression analysis to enable the evaluation of whether there is a

[127] 2019 Annenberg Study, pp. 1 & 6.

[128] See, for example, "Residential Service Requirements," for the wireless ISP Monkeybrains. https://www.monkeybrains.net/residential.php

[129] TURN July 2, 2021, Opening Comments at 33-34.

[130] Charter Comments, pp. 3, 14, 15.

[131] Charter Comments, p. 14.

statistically significant influence of income on broadband deployment when controlling for density. As discussed earlier in this reply, the data proved with the ALJ Ruling indicate that even when controlling for density (and the number of anchor institutions) that broadband deployment is directly correlated with income, customer density, and the number of anchor institutions (i.e., higher incomes, higher customer density, and more anchor institutions are associated with areas with higher levels of 100 Mbps broadband deployment). As a result, the Commission should ignore Charter's attempt to obfuscate on this matter.

Furthermore, even Charter's own consultant does not rule out the possibility that income and socio-economic factors influence the deployment of broadband facilities. Rather, the Brattle Study states that those factors "are of second-order importance."[132]

7. The Brattle Study's Methodology Shows Evidence of Digital Redlining

The Brattle Study shows clear evidence that within Los Angeles County Charter refrains from providing service to low-density areas.[133] Specifically, the population density in the areas that Charter serves in Los Angeles County is 5,479 persons per square mile. In the areas where Charter does not serve, the population density is about 75 persons per square mile. This indicates digital redlining is practiced by Charter.

[132] Brattle Study, p. 31.

[133] Brattle Study, Table 2, p. 23.

In addition, the Brattle Study also shows the existence of broadband monopoly for large numbers of Los Angeles households. Table 2, below, summarizes data presented in the Brattle Study.[134]

Table 2: Brattle Study Data on Broadband Monopoly				
County-Wide Competition				
	25/3 Mbps	100/10 Mbps	200/10 Mbps	940/10 Mbps
Percent of Population with Monopoly	18.0%	23.8%	60.5%	80.9%
Percent of Population with Two Providers (Duopoly)	58.8%	56.5%	32.9%	18.2%
Percent of Population with Three or More Providers	22.8%	19.2%	5.9%	0.2%

As shown in Table 2, for Los Angeles County overall, the higher the data speeds, the greater the likelihood that consumers will face a broadband monopoly. Even at the 100 Mbps level, nearly 24% of households face a monopoly, and another 56.5% have only two choices. For customers who desire higher speeds, the monopoly problem becomes even more pronounced, with nearly 81% of Los Angeles households facing monopoly at the 940 Mbps level. Regardless of the data speed, the existence of monopoly shows evidence of a lack of investment by firms other than Charter that is consistent with digital redlining.

Furthermore, the Brattle Study shows that Hispanic households in Los Angeles County are less likely to reside in areas with the highest levels of broadband investment, as indicated by the presence of three or more facilities-based wireline providers.

[134] Brattle Study, Table 3, p. 28.

Table 3: Brattle Study Data on Ethnicity and Race on Broadband Competition				
Impact of Hispanic Population on Competition and Investment				
Overall Population Weighted Share of Hispanic Population = 48.2%				
	25/3 Mbps	100/10 Mbps	200/10 Mbps	940/10 Mbps
Population Weighted Share of Hispanic Population with Three or More Providers	39.0%	39.5%	33.2%	34.2%

As is shown in Table 3, the overall Hispanic population-weighted share of the population in Los Angeles County is 48.2%. Hispanic households, however, are underrepresented in Census blocks with three or more broadband providers across the range of data speeds. Rather than reflecting the county-wide average of 48.2%, Hispanic households make up only 33% to 39% of households residing in areas with three or more service providers.[135]

In summary, the Brattle Study does not provide any convincing evidence that digital redlining is not occurring in California, or even in Los Angeles County (the area on which the study focuses).

8. Summary: Charter Fails to Provide Evidence Undermining any of the Three Studies

Similar to the Brattle Study, Charter also attempts to provide a lesson on the "basic economics of broadband deployment."[136] Charter notes: "Once the necessary facilities are in place, the cost of serving additional customers in that area is relatively low, giving providers a strong incentive to sign up new customers. But for areas that are not already served, the fewer homes there are per mile in a given area, the less likely a provider will be able to recover the cost of deploying new facilities."[137] TURN does not disagree with this explanation, however Charter

[135] The Brattle Study does not show consistent underrepresentation for Black households.

[136] Charter Comments, p. 16.

[137] Charter Comments, p. 16.

fails to apply this logic to alternative broadband providers such as AT&T, which has many of the necessary facilities to provide high-quality broadband in place, but has failed to invest to deliver high-speed broadband ubiquitously throughout its service area. Certainly, this is evidence of market failure, and the data provided by Charter, as shown in Table 2 above, provides clear evidence of the consequences of AT&T and other ILECs' failure to invest—monopoly broadband markets, especially for the higher-speed broadband offerings. Likewise, in rural areas of the state it is the lack of investment by cable companies that contributes to digital redlining.

Charter provides an overly narrow analysis in its attempt to refute the three studies. Charter focuses on Charter's investments and service offerings and ignores the fact that digital redlining may be caused by the lack of investment by firms other than Charter. Charter's Brattle Study suffers from the same infirmities. Charter does not provide any compelling evidence that digital redlining is not occurring in California.

C. California Cable and Telecommunications Association (CCTA)

CCTA's approach to the ALJ Ruling's questions is similar to that of Comcast and Charter. CCTA also views digital redlining as being impossible as long as one broadband ISP is present; and CCTA focuses on cable broadband deployment and ignores the problems of underinvestment and the lack of competition from ILECs and other potential broadband ISPs.[138] CCTA also points to density as being the sole culprit with regard to the data behind the ALJ Ruling's Table 1.[139] Like Comcast and Charter, CCTA indicates that there is a strong correlation between broadband availability and population density,[140] but also like Comcast and Charter,

[138] CCTA Comments, p. 4.

[139] CCTA Comments, p. 9.

[140] CCTA Comments, p. 9.

CCTA does not use multiple regression techniques to explore whether the correlation between income and broadband deployment persists when controlling for density. As noted above, TURN's regression analysis supports the proposition that even when controlling for density and anchor institutions, correlation between income and broadband deployment is statistically significant. Likewise, the fact that CCTA members have decided to stay out of California's rural areas is not recognized by CCTA as evidence of digital redlining.

CCTA also echoes Comcast and Charter on the matter of FTTP deployment.[141] CCTA argues that FTTP is not the only technology that is capable of delivering high-speed broadband services, including those at the gigabit level, and points to cable's HFC platform. TURN does not dispute that HFC is, in theory and practice, capable of delivering high-speed broadband. But like Comcast and Charter, CCTA misses the importance of the Annenberg Study's use of fiber as a proxy for investment. That is, ILECs, should they decide to invest to provide gigabit service, must deploy fiber. ILECs will not find upgrading their networks to the alternative HFC platform to be a reasonable alternative, which explains why carriers such as AT&T have deployed fiber in some areas of their service territory instead of HFC.[142] ILECs are subject to path-dependency associated with their legacy plant, and the investment path forward for ILECs leads to fiber deployment within the same footprint as their legacy plant, not HFC.[143] The lack of fiber deployment by ILECs contributes to the monopoly for broadband services that many California households face. In summary, CCTA does not add anything to the arguments of Charter and

[141] CCTA Comments, pp. 11-13.

[142] AT&T Comments, p. 2.

[143] See, for example, AT&T Comments, p. 2; Frontier Comments, p. 1; Small LEC Comments, p. 3.

Comcast and provides no evidence or reasoning that should dissuade the Commission from further examining digital redlining issues.

D. Frontier

Frontier's very brief comments deny the role of "racial animus or aversion to customers in rural areas" [144] as causes for the digital divide, and point instead to "economics."[145] The fact that there is an "economic aversion" to serving rural areas of the state is reinforced by the December, 2020 "California State Broadband Cost Model Report" (CBCM), a report that Frontier suggests that the Commission consider.[146] TURN agrees with Frontier that the CBCM report should be considered by the Commission. The CBCM Report identifies a total of 760,053 customer locations in California that are unserved at 100 Mbps download speeds.[147] The CBCM Report also shows that costs of deployment are highest in low density areas,[148] a fact consistent with digital redlining in rural areas.

The CBCM Report is based on the "Connect America Cost Model,"[149] a model initially developed for the FCC to support its high-cost Universal Service programs, which target ILECs.[150] The CBCM Report produces "estimated network deployment costs of a fiber to the premises network capable of meeting current and future consumer bandwidth demand

[144] Frontier Comments, p. 2.

[145] Frontier Comments, p. 2.

[146] Frontier Comments, p. 2.

[147] CBCM Report, p. 8.

[148] CBCM Report, pp. 14 & 15.

[149] CBCM Report, p. 5.

[150] See, for example, *In the Matter of Connect America Fund ETC Annual Reports and Certifications Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket No. 10-90, WC Docket No. 14-58, WC Docket No. 14-192, Report and Order, FCC 14-190, December 18, 2014, ¶11.

requirements."[151] Despite its attempt to dismiss the studies referenced in the ALJ Ruling as "advocacy pieces,"[152] Frontier must acknowledge the fact that the FCC and the CBCM identify fiber as the relevant technology when determining the cost of buildout to unserved areas. The CBCM report thus supports the Annenberg Study's focus on fiber deployment as a valid measure of investment, especially for ILECs. TURN agrees with Frontier that the Commission should be "gathering data and studies" to determine the measures it will take to bridge the digital divide. However, Frontier errs by suggesting the existing studies and comments in the record do not already support the need to address digital redlining as one of those necessary measures that the Commission must take.

E. AT&T

In opening comments TURN addressed the problems created by AT&T and its broadband deployment practices, some of which were revealed in detail through the Commission's Network Exam Study.[153] There is ample evidence that AT&T has set its investment priorities with a focus on speculative entertainment ventures to the exclusion of broadband investment in California.[154] TURN has already addressed AT&T's recent claims regarding investment, specifically its $2 billion commitment across its 21-state operations.[155] AT&T flags that commitment in its opening comments, but provides no details regarding the impact of this new fiber deployment initiative on California, other than to state that it would include "several California cities."[156]

[151] CBCM Report, p. 5.

[152] Frontier Comments, p. 2.

[153] TURN July 2, 2021, Opening Comments at 37-40.

[154] TURN July 2, 2021, Opening Comments at 37-42.

[155] TURN July 2, 2021, Opening Comments at 40.

[156] AT&T Comments, p. 12.

1. AT&T Inappropriately Conflates Wireless and Wireline Investment

AT&T's response to the ALJ Ruling is based on the conflation of AT&T's investment in wireless and wireline networks.[157] TURN believes that AT&T's underlying assumption that wireless mobility and fixed broadband networks are equivalent is deeply flawed and tone deaf. TURN is also dismayed to find the state's largest ILEC presenting a backward-looking evaluation of broadband usage. For example, AT&T states that "many Americans have already chosen to switch entirely to mobile wireless broadband," citing to the FCC's *2017* broadband deployment report.[158] Apparently the Commission Staff's 2020 assessment of broadband needs has been overlooked by AT&T. Staff stated that "In terms of broadband technologies, it is important to note that mobile broadband services are not a viable substitute for fixed broadband services due to current cost, access, and capacity limitations of wireless technology. For example, schoolwork, job applications, and government services are functions that are difficult, if not impossible, to accomplish using mobile broadband services for most ratepayers."[159] This conclusion was reached by the Staff prior to the pandemic shutdowns and the ongoing fundamental societal and economic shift associated with online activities as a result of the pandemic.

AT&T states "Additionally, because of the price, range of functionality and portability of wireless devices, wireless service may be a preferred option for those with limited disposable income."[160] That AT&T is still selling the idea that wireless mobility is good enough for low-income families is startling and is consistent with a company that practices digital redlining as a

[157] AT&T Comments, pp. 2, 3, 7, 9, 10, 20, and 23.

[158] AT&T Comments, p. 10, footnote 15.

[159] CPUC, "Affordability Metrics Framework," Staff Proposal, R.18-07-006, January 2020.

[160] AT&T Comments, p. 10.

matter of corporate policy. TURN believes that AT&T's callous disregard for the needs of low-income households is consistent with the outcomes that have been documented in the 2019 and 2021 Annenberg Study, the CWA & NDIA study, and the Commission's own Network Exam study—AT&T systematically avoids investing in low-income areas, which is harmonious with its explicitly stated position in its opening comments that low-income households will be best served by wireless mobility services. In light of the lessons learned from the ongoing COVID-19 crisis, this Commission should not buy into AT&T's flawed logic that wireless mobility services are a reasonable substitute for wireline broadband.

2. AT&T's Investment Claims are Based on Partial Data

AT&T claims that it has deployed fiber broadband equally, regardless of race or income. AT&T states:

> AT&T's fiber network covers about 25% of households above the poverty line and about 25% of households below the poverty line. Similarly, its fiber network covers about 25% of Census-designated "White" households and about 25% of census-designated "Non-White" households. Thus, none of these demographics is over- or underrepresented in AT&T's fiber footprint.[161]

Yet, AT&T's comments demonstrate that these claims are not based on AT&T's overall deployment of fiber, but only of its fiber deployment since 2016.[162] That AT&T has chosen to present data on a selected subset of its overall fiber deployment practices begs the question—what about AT&T's fiber deployment practices prior to 2016—what is the overall profile of AT&T fiber deployment based on race and income? AT&T fails to answer that question.

Furthermore, the fact that AT&T alleges that it has corrected the discrepancies that were flagged by the 2019 Annenberg study when comparing fiber deployment in Glendale and

[161] AT&T Comments, pp. 2-3.

[162] AT&T Comments, pp. 11-12 and AT&T's Table 1 therein.

Compton[163] does not undermine the 2019 Annenberg's Study's finding that as of 2017 AT&T had not deployed fiber in the Compton and Watts areas of Los Angeles, while it had in Glendale.[164] Certainly, the historical lag in investment in broadband harms communities and it should not take an academic study to "out" these practices and spur a company like AT&T into action.

AT&T also presents a distorted view of its overall fiber deployment. While it may seem impressive that AT&T has increased fiber deployment in California by 498.86%,[165] the disappointing fact remains that AT&T has made fiber available to only 25.15% of households in AT&T's wireline service area.[166] Thus, AT&T's lack of fiber investment leaves many households with a broadband monopoly for higher speed broadband services, as was discussed earlier with TURN's evaluation of Charter's comments.

AT&T also attempts to discredit the ALJ Ruling's Table 1 analysis by indicating that density differences explain the availability of broadband service.[167] As has already been discussed in these reply comments, the data underlying the ALJ Ruling's Table 1 indicate that while controlling for density and the number of anchor institutions, a statistically significant correlation between broadband availability at 100 Mbps and income exists.

3. AT&T's Six Suggestions

AT&T offers six suggestions for a path forward on broadband deployment. TURN believes that some of these suggestions have merit, especially those directed at providing relief

[163] AT&T Comments, pp. 22-23.

[164] 2019 Annenberg Study, p. 5.

[165] AT&T Comments, p. 12, Table 1.

[166] AT&T Comments, p. 12, Table 1.

[167] AT&T Comments, p. 24, Table 3.

to low-income customers with access to broadband but who cannot afford it, and a funding mechanism to support adoption programs. TURN also notes that AT&T's suggestion that there be safeguards for the "hundreds of thousands" of unserved California households indicates that digital redlining is a reality in California. That AT&T and other service providers will not serve those customers until they receive government or surcharge funded support reflects the proposition that digital redlining based on the standard business decision-making discussed by TURN in opening comments is a reality.[168]

In summary, AT&T's comments demonstrate that AT&T has not made fiber broadband widely available in its service area, and also show that AT&T believes that wireless mobility services should be the go-to solution for serving low-income customers. This statement of AT&T's corporate policy is consistent with a philosophy of digital redlining. AT&T admits that it believes low-income consumers are best served by wireless mobility services, which as discussed above, has not been proven to meet the basic human right of access to high quality and affordable broadband services. Likewise, AT&T's admission that it has built fiber to only 25% of its customer locations provides evidence of discriminatory investment practices. AT&T does not provide any convincing evidence that the Commission should not continue to investigate digital redlining.

F. Small LECs

Small LECs state that "several factors make the notion of digital redlining foreign to the Small LECs and their ISP affiliates.[169] TURN notes, however, that a detailed study conducted by TURN as part of the Commission's review of its California High Cost Fund-A public purpose

[168] TURN July 2, 2021, Opening Comments at 28-29.

[169] Small LEC Comments, p. 2.

program (R.11-11-007) found that the Small LEC's have not upgraded their networks consistently, leaving many customers with only very-low-speed broadband options.[170] Likewise, with regard to fiber deployment most of the Small LECs had very low deployment levels.[171] TURN also found that ISP affiliates engaged in pricing practices that contributed to low broadband adoption and the continued use of very low speed data services, even in areas where higher speed services were available.[172] TURN's analysis found that among the Small LECs, broadband deployment at the 25/3 Mbps level varied widely, and several of the Small LECs have either no, or very little broadband available at those speeds.[173] TURN also found that because of high prices, most Small LEC customers had adopted broadband at speeds of 6 Mbps download, or less, and over 96% of Small LEC customers had adopted at speeds *below* 25/3 Mbps.[174] All of this suggests that the Small LECs have a long road to travel to meet the Commission's 100 Mbps download objective, and the observed pricing practices of the Small LECs, which included

[170] OIR into the Reivew of the California High Cost Fund-A Program (R.11-11-007), Opening Brief of the Utility Reform Network (April 21, 2020) at 6-7, 8 citing the Direct Testimony of Trevor R. Roycroft, Ph.D. in R.11-11-007, November 15, 2019, at 38-39; *see also*, D.21-04-005 (R.11-11-007, April 21, 2021) at 17 (The evidence in this proceeding highlights and reflects an ongoing and substantial 'digital divide' in the availability of robust, reliable and affordable broadband services in many rural parts of California."); *see also*, D.21-06-004 (R.11-11-007) at 34-35 (citing to TURN's data and finding low subscription rates and unaffordable broadband service in Small LEC territory.).

[171] R.11-11-007 Opening Brief of the Utility Reform Network (April 21, 2020) at 7, 9, citing the Direct Testimony of Trevor R. Roycroft, Ph.D. in R.11-11-007, November 15, 2019, at 43.

[172] R.11-11-007 Opening Brief of the Utility Reform Network (April 21, 2020) at 10, citing the Direct Testimony of Trevor R. Roycroft, Ph.D. in R.11-11-007, November 15, 2019, at. 54-58.

[173] R.11-11-007 Opening Brief of the Utility Reform Network (April 21, 2020) at 6-7, citing the Direct Testimony of Trevor R. Roycroft, Ph.D. in R.11-11-007, November 15, 2019, at 42.

[174] R.11-11-007 Opening Brief of the Utility Reform Network (April 21, 2020) at 7-8, 9 citing the Direct Testimony of Trevor R. Roycroft, Ph.D. in R.11-11-007, November 15, 2019, at 7, 57-59; *see also*, D.21-06-004 (R.11-11-007) at 34-35 (citing to TURN's data and finding that "Many parties in briefs and testimony have affirmed that the broadband adoption percentage is low in the Small ILECs' service territories because the broadband rates are not affordable for many rural consumers").

charging very high rates for very low speed broadband services, place consumers residing in Small LEC service areas at a decided disadvantage.

G. New York Law School's Advanced Communications Law & Policy Institute (ACLPI)

While it is important for the Commission to hear from all parties, regardless of their location, including those from New York, TURN believes that it is also important that the Commission be given context for the opinions submitted. According to ACLPI, the New York Law School receives support from private companies that "operate in the telecommunications, broadband, Internet, and energy spaces."[175] TURN is concerned that ACLPI's other work reveals a predictable pattern of advancing positions for broadband ISPs under the veil of a neutral scholarly program. TURN provides this context for the Commission's consideration.

As will be discussed further below, ACLPI has submitted opening comments in this proceeding that align with broadband ISP goals. This is typical of ACLPI's approach. Two cases in point are (1) ACLPI's extensive support of the controversial T-Mobile/Sprint merger,[176] where ACLPI dismissed out of hand credible concerns of the potential adverse effects of that

[175] ACLP at New York Law School, Memorandum "Statement of Academic Independence" (January 2006) http://comms.nyls.edu/ACLP/NYLS-AcademicFreedom.pdf.

[176] The ACLPI comments filed in the T-Mobile/Sprint proceeding follow the script that T-Mobile and Sprint advanced in their application. See ACLPI's FCC comments, https://ecfsapi.fcc.gov/file/10917026076059/ACLP%20-%20Comments%20-%20T-Mobile-Sprint%20(WT%20Docket%20No.%2018-197)%20-%20September%2017%202018.pdf ; see also, ACLPI's Comments with the Department of Justice, https://www.justice.gov/atr/page/file/1214571/download ; see also, ACLPI's New York Public Service Commission Comments, http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={304D64B4-2805-4431-8843-CDBABF10E7BB}. Compare ACLPI Comments filed with FCC with the T-Mobile public interest statement filed with the FCC at: https://ecfsapi.fcc.gov/file/10618281006240/Public%20Interest%20Statement%20and%20Appendices%20A-J%20(Public%20Redacted)%20.pdf.

merger on low-income customers and communities of color;[177] and (2) ACLPI's vocal committed opposition to municipal broadband networks.[178] As was the case with these issues, TURN urges the Commission to read their comments with the understanding that ACLPI is channeling the Broadband ISPs in this proceeding.

It is with this background that TURN now considers ACLPI's comments in this proceeding. TURN notes that ACLPI is highly critical of the Commission's seeking comment on the three studies. ACLPI states that the request for comment on the studies "creates a high

[177] "Detractors have attempted to argue that these clear consumer gains are outweighed by harms that will arise as a result of the merger. A major focus of theirs is the market for prepaid wireless service. Their argument is that the merger will result in harmful consolidation in the prepaid market, depriving consumers, particularly people of color and low-income individuals, of choice and raising prices. *Such concern is misplaced*." ACLPI FCC Comments, p. 32, emphasis added.

The reviewing agencies met these arguments with strong disfavor and significant conditions were placed on the merger, with a focus on protecting competition in the prepaid industry, which ultimately required the divestiture of Boost Mobile and pricing constraints for preexisting customers. See, *Applications of T-Mobile US, Inc., and Sprint Corporation For Consent To Transfer Control of Licenses and Authorizations Applications of American H Block Wireless L.L.C., DBSD Corporation, Gamma Acquisition L.L.C., and Manifest Wireless L.L.C. for Extension of Time*, WT Docket No. 18-197, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, FCC 19-103, November 5, 2019, ¶¶189, 209, 344. https://docs.fcc.gov/public/attachments/FCC-19-103A1.pdf; "Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish, Divestiture Will Enable DISH's Entry as a Fourth Nationwide Facilities-Based Wireless Competitor and Expedite Deployment of High-Quality 5G for American Consumers," (July 26, 2019) https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package; *In the Matter of the Joint Application of Sprint Communications Company L.P. (U5112) and T-Mobile USA, Inc., a Delaware Corporation, For Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a).* Application 18-07-011, "Decision Granting Application and Approving Wireless Transfer Subject to Condition, Decision 20-04-008, April 27, 2020. https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M335/K378/335378035.PDF.

[178] See, for example, "A Closer Look: Berkman's Municipal Fiber Pricing Study," January 2018. http://comms.nyls.edu/ACLP/Closer-Look-Berkman-GON-Pricing-Study-January-2018.pdf ; see also "A Closer Look: Santa Monica's Citynet," March 2018. http://comms.nyls.edu/ACLP/Closer-Look-Santa-Monica-CA.pdf. ACLPI also warned policymakers in a 2020 "Policymakers' Broadband Checklist—COVID-19 Supplement" that "it is essential that state and local officials exhaust all options before seeking to invest scarce public funds in a municipal broadband infrastructure project."_ACLPI, "Policymaker's Broadband Checklist—COVID-19 Supplement," http://comms.nyls.edu/ACLP/ACLP-Policymaker-Tool-Kit-COVID-Supplement.pdf.

bar for those seeking to refute the studies' sweeping conclusions because it appears that the Commission may have already accepted their conclusions as fact."[179] TURN strongly disagrees with this assessment. The ALJ's statement on the purpose of the proceeding reflects an open-minded inquiry that leaves room for all voices: "To begin this investigation, this ruling requests comments on several studies on the issue, in addition to allowing parties to offer their own data and analysis."[180] TURN does not see how this statement can be construed to suggest, as ACLPI condescendingly claims, that the Commission has already "accepted the conclusions of the study as fact." TURN also expects that ACLPI would be prepared to present and support its own position and not expect that the Commission would come to these issues with a similar bias as ACLPI and the broadband ISPs.

TURN has already addressed criticism similar to that leveled by ACLPI against the three studies. For example, ACLPI, like Charter, is also critical of the 2019 Annenberg Study's use of fiber deployment as a proxy for investment.[181] However, with regard to the other analytical factor considered in the Annenberg study, i.e., the role of competition, ACLPI takes a position that is even more extreme than the broadband ISPs: "Competition does not directly reflect the experiences of consumers in a given market, and its accuracy in reflecting investment levels is dubious thanks to the varying activities of different ISPs and their utilization of a wide array of technologies."[182] As an example of the "wide array of technologies" that ACLPI considers to solve the broadband availability problem for low-income households is the WISP

[179] ACLPI July 2, 2021, Opening Comments at 6.

[180] ALJ Ruling, p. 1.

[181] ACLPI July 2, 2021, Opening Comments at 25.

[182] ACLPI July 2, 2021, Opening Comments at 25.

Monkeybrains.[183] However, as discussed above, fixed wireless solutions are not always viable in urban areas, a point that ACLPI appears to concede.[184] Nor are they viable in California rural areas characterized by challenging topography, dense vegetation and inadequate middle-mile facilities.

ACLPI is also critical of the 2019 Annenberg Study for its failure to account for "growth" in competition and adoption.[185] With regard to competition, ACLPI points to FCC data on broadband availability at the 25/3 Mbps level, which is not on point given the 100 Mbps standard identified in the OIR in this proceeding. However, even at the 25/3 Mbps speed level ACLPI acknowledges that by 2019 the number of households that remained without a choice of at least two broadband ISPs was about 25%. As noted earlier, in the discussion of data provided by Charter, at higher speeds, even larger numbers of California households face a broadband monopoly, or duopoly at best.

With regard to adoption, ACLPI is pleased to see that the adoption gap between low-income and upper income households in Los Angeles County has diminished from 45% in 2013 to 30% in 2019.[186] TURN is also pleased to see this decrease in the adoption gap, but strongly disagrees with ACLPI that the trend lends "little credence to a finding of 'market failure' and do not support a major shift in regulatory attitudes."[187] TURN believes that there is substantial

[183] ACLPI July 2, 2021, Opening Comments at 17.

[184] "[S]peeds and pricing appear to vary depending on where the service is available due to a range of considerations." ACLPI July 2, 2021, Opening Comments at 17.

[185] ACLPI July 2, 2021, Opening Comments at 27-29

[186] ACLPI July 2, 2021, Opening Comments at 28.

[187] ACLPI July 2, 2021, Opening Comments at 29.

evidence of market failure in California broadband markets, as discussed in TURN's opening comments, other parties' filings, and elsewhere in this reply.[188]

1. ACLPI's Solution to Redlining Results in More Redlining

Regarding solutions to the digital redlining problem, ACLPI states that there is no "'one size fits all' model for enhancing broadband connectivity," and that there are an "array of non-traditional business models being deployed by relatively new ISPs in California."[189] ACLPI then describes examples of these non-traditional business models, which include: (1) Google Fiber's deployment of facilities in Orange County, "where it offers broadband services to 'a select few high-end apartment buildings in neighborhoods like Irvine, Cypress Village, and Woodbury.'"[190] (2) The deployment of fixed wireless services to public housing developments in San Francisco and Los Angeles by the service providers Monkeybrains and Starry.[191] And (3) the use of Wi-Fi to "plug gaps in availability" in some California cities.[192] Regarding these examples, ACLPI concludes:

> These efforts further underscore how business decisions tend to be shaped by a range of forces and yield broadband offerings that vary greatly from city to city and sometimes from neighborhood to neighborhood. It does not appear that any of the examples cited above have been described as "digital redlining."[193]

As is the case with some ISP provider comments, ACLPI's comments are tone deaf. The rich who live in "a select few high-end apartment buildings" get fiber, while the poor get "Monkeybrains" and stopgap Wi-Fi deployments. ACLPI's examples certainly do illustrate

[188] See, infra Section V, See also, TURN July 2, 2021, Opening Comments at 28-29.

[189] ACLPI July 2, 2021, Opening Comments at 16.

[190] ACLPI July 2, 2021, Opening Comments at 17.

[191] ACLPI July 2, 2021, Opening Comments at 17.

[192] ACLPI July 2, 2021, Opening Comments at 17.

[193] ACLPI July 2, 2021, Opening Comments at 18.

digital redlining and piling on more discriminatory technology solutions does not solve the digital redlining problem.

While ACLPI claims that its examples do not represent digital redlining, ACLPI cites to a news article that emphasizes that Google Fiber's strategy is consistent with digital redlining.[194] ACLPI references an article from the *Philadelphia Tribune* with the title "Google's Broadband War Redlining Black Communities." That article states:

> Instead of providing internet, or broadband, service to all residents in the communities it plans to serve, Google appears to be engaged in the abhorrent practice of redlining: depriving these services to certain neighborhoods based on income, ethnicity and race. Should this pattern hold true, the inevitable result will be the undermining of communities that are in most need of broadband access, thereby deepening the digital divide.[195]

This sentiment about Google Fiber has been expressed by numerous others.[196] Contrary to ACLPI's claims, solutions that simply reinforce digital redlining will not solve the digital redlining problem.

2. ACLPI Recognizes the Digital Divide Between Rich and Poor, But ACLPI Thinks the Poor Should be Happy with Wireless Mobility Services

With regard to digital redlining, ACLPI appears to understand the nature of the problem: "network upgrades and new service offerings tend to be phased in, with areas of highest demand

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[194] ACLPI July 2, 2021, Opening Comments at 18, note 47.

[195] Khalil Abdullah, "Google's Broadband War Redlining Black Communities," Jan. 6, 2017, *Philadelphia Tribune*, https://www.phillytrib.com/commentary/googles-broadband-war-redlining-black-communities/article_78510d50-d377-59ef-8032-2db568d647c4.html.

[196] See, for example: "The Truth About Google Fiber and the Digital Divide in Kansas City," *KCDigitalDrive,* April 3, 2015, https://www.kcdigitaldrive.org/article/the-truth-about-google-fiber-and-the-digital-divide-in-kansas-city/ ; "Congressman Cleaver Works to Close the Digital Divide, Expand Internet Access in Low-Income Communities, Press Release, February 5, 2015, https://cleaver.house.gov/media-center/press-releases/congressman-cleaver-works-to-close-the-digital-divide-expand-internet ; "Pastors to Google Fiber: Don't Exclude Poor Communities," *The Tennessean,* June 28, 2016, https://www.tennessean.com/story/money/2016/06/28/pastors-google-fiber-dont-exclude-poor-communities/86484240/ ; "Google Fiber Was Doomed from the Start," *Wired,* March 14, 2017, https://www.wired.com/2017/03/google-fiber-was-doomed-from-the-start/ ;

being prioritized."[197] While wealthy areas of the state will receive those services, lower-income areas will not. However, this phenomenon does not appear to bother ACLPI because ACLPI believes that low-income consumers who cannot afford the new services associated with network upgrades can simply buy inferior non-wireline broadband services:

> Advances in non-wireline options in particular provide consumers with the ability to access the internet at broadband speeds wherever they go. A broader perspective of the broadband market is therefore critical to ensuring that policy accurately reflects and advances real consumer demand and not what some think consumers *should* be demanding or using.[198]

Even if one ignores the equity issues associated with broadband, ACLPI also fails to recognize that broadband is a service that is subject to network effects. Broadband becomes more valuable to everyone as more and more people use the network, and the value of high-speed fixed broadband likewise increases as more people have access to, and can afford, the service. This fact appears to be lost on ACLPI, who is content for low-income consumers to make do with mobility wireless service, suggesting that the regulator's focus on universal access to high quality wireline broadband service is an antiquated notion:

> Many entities, including the FCC, focus primarily on wireline availability at a residence when assessing whether markets are served and whether there is sufficient competition. . . . *In areas where there appears to be an obvious preference for mobile broadband, deploying additional wireline offerings would seem to make little sense*.[199]

Similar to ACLPI's perspective in the T-Mobile/Sprint case, those with "obvious preference" for wireless mobility services, i.e., "particularly people of color and low-income individuals,"[200] must be happy to be wireless only, as that is what they buy. ACLPI's circular

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[197] ACLPI July 2, 2021, Opening Comments at 19.

[198] ACLPI July 2, 2021, Opening Comments at 19, emphasis in the original.

[199] ACLPI July 2, 2021, Opening Comments at 15, emphasis added.

[200] *See supra* notes 176 and 176, ACLPI FCC Comments in the T-Mobile/Sprint Merger Proceeding, at 32.

logic begs the question that is foundational to this proceeding—is this outcome equitable? Never mind the fallout of this perspective during on the ongoing pandemic where it has become abundantly clear that wireless-only service fails to deliver a reasonable level of broadband connectivity.[201] Never mind that the Commission Staff reached a similar conclusion prior to the pandemic.[202] ACLPI finds that broadband deployment policies should simply encourage unhindered market forces to let "supply match demand." This perspective, if followed by the Commission, would cement the digital divide, and enshrine digital redlining practices as policy. As was the case with ACLPI's comments on the T-Mobile/Sprint merger, ACLPI offers no solution to the problems facing low-income individuals and communities of color.

3. The Commission Should Reject ACLPI's Assessment of Digital Redlining

TURN notes that ACLPI recommends that the Commission remain "above the fray," when considering issues of digital redlining.[203] ACLPI laments that "The atmosphere surrounding once-staid debates about telecommunications policy has become charged by the same forces that have upended political discourse in this country."[204] ACLPI urges the Commission to not bow down to "advocates of positions far removed from the realities of the U.S. broadband marketplace (who) are seeking to have their perspective and positions define the path forward, to the exclusion of reasoned debate and data that contradict their assertions."[205] Yet, during the peak of the pandemic lockdowns, the Director of ACLPI, took the time to pen a

[201] TURN July 2, 2021, Opening Comments at 29.

[202] Affordability Metrics Framework, Staff Proposal, R.18-07-006, January 24, 2020, p. 22. See also, Decision 20-07-032 in R.18-07-006, July 22, 2020, pp. 32-33.

[203] ACLPI July 2, 2021, Opening Comments at 35.

[204] ACLPI July 2, 2021, Opening Comments at 35.

[205] ACLPI July 2, 2021, Opening Comments at 35.

piece accusing those who were advocating for policies to support expanded access to affordable communications services, like TURN, EFF, Cal Advocates and others, as "disaster opportunists."

> As communities across the U.S. continue to grapple with the unprecedented and staggering fallout of the COVID-19 pandemic, there are individuals and groups that view this crisis as an opportunity to advance their broadband policy agendas. *For as much as such disaster opportunism might seem like a nauseating display of tone-deafness at best or narcissism at worst, it is sometimes difficult to dismiss what these advocates have to say because they are skilled at playing on the emotions of decision-makers and convincing them to pursue risky broadband projects. As policymakers consider additional responses to the social and economic impacts of the crisis, it is essential that they immunize themselves from the hysteria being spread by these opportunists*[.][206]

There is much to unpack in this remarkable statement from one who now complains about the tone associated with telecommunications policy debates in this country. TURN suggests turning the tables on ALCPI to expose its own narcissism in refusing to acknowledge clear data-driven findings of market failure that cause harm to vulnerable communities while also attempting to shame policy makers, who, refuse the industry's "immunization" and, instead risk becoming infected with the idea that broadband markets are not meeting the needs of society.

Mr. Santorelli's blame-the-victim strategy suggests that he and ACLPI have little understanding of the consequences of the pandemic. It was not "disaster opportunists" who were begging for help with access to affordable and high-quality broadband. Rather, it was families, teachers, first responders, and healthcare providers who found that market forces had failed to deliver affordable high-quality affordable broadband service. Naturally, those individuals, and groups that advocate for those individuals, sought solutions to correct long-standing market failures. If there is an "opportunist" found in this story, it is ACLPI and its call to ignore the

[206] Michael Santorelli, "How to Fight COVID-Inspired Disaster Opportunism in the Broadband Space," *Forbes,* May 4, 2020, emphasis added. https://www.forbes.com/sites/washingtonbytes/2020/05/04/how-to-fight-covid-inspired-disaster-opportunism-in-the-broadband-space/

problems of the most vulnerable consumers caused directly by the policies and the broadband ISPs that it now supports. If ACLPI's perspective on the digital redlining problem is adopted by the Commission, that certainly would be a "disaster," as the perpetuation of digital redlining appears to be just fine with ACLPI.

VII. THE COMMISSION HAS AMPLE JURISDICTIONAL AUTHORITY TO INVESTIGATE AND ACT TO MITIGATE AGAINST DIGITAL REDLINING IN CALIFORNIA

A. Jurisdiction Over Broadband Services

In previous decisions, the Commission has held that broadband internet access is essential and "the Legislature contemplated a significant role for the Commission in closing the digital divide in California and in bringing advanced communications services, including broadband internet access, to all Californians."[207] When addressing the issue of network resiliency regulation, the Commission clarified that its jurisdiction includes using its police powers over all essential utility network services, which the Commission has recognized encompasses interconnected voice over internet protocol (VoIP).[208] In a more recent decision, the Commission reaffirmed its authority over broadband in response to parties' assertions that the FCC preempts state law. There, the Commission cited *Mozilla v. FCC,* 940 F. 3d 1, 76 (D.C. Cir. 2019), as "recognizing the role of the states in regulating broadband."[209] The record here reflects a number of commenters that support the Commission's actions and also present a

[207] *See e.g.*, D.20-07-032 (R.18-07-006) at 5, 25.

[208] Pub. Util. Code §§ 451, 584, 701, 761, 768, and 1001. *See also* Decision Adopting Wireline Provider Resiliency Strategies, D.21-02-029, February 11, 2021, at 12-13, 97-98 (Conclusions of Law).

[209] D.21-04-005, Order Instituting Rulemaking into the Review of the California High Cost Fund-A Program, Decision Adopting Broadband Imputation in the General Rate Cases of the Small Independent Local Exchange Carriers (April 15, 2021) at 13-14 ("We accordingly find no impediment to this Commission's legal authority to adopt and implement broadband imputation rules set forth in this decision").

positive analysis of the Commission's jurisdiction.[210] Below we provide additional detail and address claims that the Commission's authority over broadband is limited.

1. State Police Powers and Broadband

California has suffered through wildfires, earthquakes, a pandemic, and a drought that continue to inflict real consequences for its residents. These events reveal a great communications divide between those that have access to robust broadband services that allow them to work, learn and access health care and other essential services from the comfort and relative isolation of their homes; compared to those who cannot afford, or do not have access to, such services and become "disconnected" from their work, school, emergency services and community when any type of disaster strikes. States have a recognized police power to protect the "lives, limbs, health, comfort, and quiet of all persons . . . within the State."[211] The Tenth Amendment of the U.S. Constitution states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[212]

But these police powers are not only applicable during natural disasters such as pandemics, droughts, or even wildfires, rather the Commission has relied on them to pave the way for the communication infrastructure to be established across the state, sometimes over

[210] *See* National Diversity Coalition Opening Comments at 12-13; CWA July 2, 2021, Opening Comments at 24.

[211] *Slaughter-House Cases* (1873) 83 US 36, 62. In *Medtronic v. Lohr*, the Supreme Court reasoned that "[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, . . .matter[s] of local concern,' the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic v Lohr*, 518 U.S. 470, 475 (1996) (internal citations omitted).

[212] U.S. Const. Amend. X.

private property.[213] This Commission's reliance on its police powers has provided a foundation for the Commission to adopt a series of consumer protections, emergency services requirements, service quality standards, network resiliency requirements, and even low income support programs. But the Commission has also adopted a series of rules that govern support structures such as pole and conduits.[214] The fact is that the same physical structures or other realities govern where broadband service is provided and the infrastructure to do so. Therefore, the Commission is not only authorized, but is compelled to use state police powers to investigate access to broadband infrastructure for broadband service, and as appropriate, consider additional action.[215]

2. Arguments that Call for Limits on Commission Jurisdiction Are Not Persuasive

Parties do not directly challenge the Commission's authority to investigate the practices of digital redlining; instead, once digital redlining is documented, parties speculate about the actions the Commission may take to address the problem and challenge the Commission's authority to carry out those speculative remedies.

a) DC Circuit's Opinion in Mozilla Corporation v. Federal Communications Commission and United States of America

In the recent *Mozilla Corporation v. Federal Communications Commission and United States of America*, the DC Circuit Court of Appeals found that the FCC may not indiscriminately

[213] Witteman, Christopher, Loyola of Los Angeles Law Review, Net Neutrality from the Ground Up at 23-26 (Volume 55, forthcoming) available http://dx.doi.org/10.2139/ssrn.3822016.

[214] For example, the Commission received input from industry for a decision related to utility pole access for broadband transport facilities. D.18-04-007.

[215] For example, there are some commenters that suggest the Commission address pole attachment reform. CCTA July 2, 2021, Opening Comments at 7.

restrict state laws that regulate broadband services.[216] The *Mozilla* Court[217] opens a door for state commissions to fill the gap left by the FCC's reclassification decision and its forbearance policies; state commissions may use state police powers and tailored and directed regulations and laws to further state policies and protect residents.

The DC Circuit in Mozilla clearly explained that conflict preemption is fact-specific, and that the FCC would have to show that a specific state law undermines the 2018 FCC Order. The Court references Supreme Court precedent that "mere worries that a policy will be 'frustrate[d]' by 'jurisdictional tensions' inherent in the Federal Communications Act's division of regulatory power between the federal government and the States does not create preemption authority."[218]

In terms of field preemption, the *Mozilla* Court found that the FCC could not rely on Title I, specifically 47 USC § 152, but instead it must have an independent source of authority to issue a blanket preemption, and the DC Circuit reasoned that the FCC did not have one.[219] For this reason, there can be no field preemption where the FCC has chosen not to regulate; the DC Circuit agreed by stating that a "federal policy of nonregulation for information services" cannot sustain the FCC Preemption Directive.[220]

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[216] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 74 (D.C. Cir., October 1, 2019), *cert. denied*, 2020 U.S. App. LEXIS 3726* (D.C. Cir., February 6, 2020)(No. 18-1051)(per curiam).

[217] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 81 (Not only is the FCC lacking its own statutory authority to preempt, but its effort to kick the States out of intrastate broadband regulation also overlooks the Communications Act's vision of dual federal-state authority and cooperation in this area specifically citing numerous federal law sections that preserve state authority under police powers and consumer protection and affordability).

[218] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 85 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 375 (1986)).

[219] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 86.

[220] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 78-79. The DC Circuit discusses this point at length and concludes that the Commission cannot "completely disavow Title II with one hand while still clinging to

Therefore, field preemption does not apply in this instance, and the Commission has jurisdiction to act here, notwithstanding industry claims that its jurisdiction is "severely limited."

b) The US District Court for the Eastern District of New York's Opinion in *New York State Telecommunications Association v James*

Comcast's reference to a federal district court ruling in New York relates to a recent New York state statute, requiring certain ISPs to create specific affordable broadband service offerings. In *New York State Telecommunications Association v James*, the United States District Court for the Eastern District of New York ("*NY State Telecom* District Court") granted a preliminary injunction request, finding that the plaintiffs had a likelihood of prevailing on the merits.[221] For purposes of this discussion, we limit the following to the conflict preemption and field preemption discussions and show that they are not aligned with the *Mozilla*'s court's reasoning.

The *NY State Telecom* District Court found that the plaintiffs demonstrated a likelihood of success on conflict preemption, even in the face of the DC Circuit decision in *Mozilla*, based

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the Title II forbearance authority with the other" and made several references to case precedent *Mozilla Corp. v. FCC*, 940 F.3d 1 at 80. The court further stated that:

> Not only is the Commission lacking in its own statutory authority to preempt, but its effort to kick the States out of intrastate broadband regulation also overlooks the Communications Act's vision of dual federal-state authority and cooperation in this area specifically. See, e.g., 47 U.S.C. § 1301(4) ("The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data."); id. § 1302(a) (referring to "[t]he Commission and each State Commission with regulatory jurisdiction" in a chapter titled "Broadband"); id. § 1304 ("[e]ncouraging State initiatives to improve broadband"); cf. id. § 253(b) ("Nothing in this section shall affect the ability of a State to impose * * * requirements necessary to * * * protect the public safety and welfare, * * * and safeguard the rights of consumers."). *Mozilla Corp. v. FCC*, 940 F.3d 1 at 80-81.

[221] *New York State Telecommunications Association, Inc., et.al, v. Letitia A. James, Attorney General of New York*, Case 2:21-cv-02389-DRH-AKT, 2021 U.S. Dist. LEXIS 110127* (E.D.N.Y. June 11, 2021)("New York State Telecom.").

on the reasoning that the FCC did not abdicate "jurisdiction writ large, even though Title I may not confer as expansive powers as . . .Title II."[222] The *NY State Telecom* District Court further reasoned that the FCC still had jurisdiction to "impose additional regulatory obligations under its Title I ancillary jurisdiction"[223] But, this reasoning does not reflect a close read of *Mozilla*, where the *Mozilla* Court explains that "ancillary" authority in Title I allows the FCC to impose regulations that are necessary to execute its statutorily authorities, which are enumerated in Title II, III, and VI.[224] However, Title I does not give the FCC express authority, it is "not an independent source of regulatory authority"[225] as the *NY State Telecom* District Court claims would allow the FCC to impose additional regulations on broadband service.

With its mistaken belief that Title I gives the FCC an independent source of regulatory authority or express authority to preempt state broadband service regulations, the *NY State Telecom* District Court concludes that the state statute stood as an "obstacle to the FCC's accomplishment and execution of its full purpose and objectives and [was] conflict-preempted."[226]

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[222] *New York State Telecom.*, 2021 U.S. Dist. LEXIS 110127, at *18-19

[223] *New York State Telecom.*, 2021 U.S. Dist. LEXIS 110127, at *20.

[224] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 74-76. The *Mozilla* Court explained that the FCC by reclassifying broadband as an information service, the FCC "placed broadband *outside* of its Title II jurisdiction . . . broadband is not a "radio transmission" under Title III or a cable service under Title VI." It further explained that Congress did not "statutorily grant the Commission freestanding preemption authority to displace state laws even in areas in which it does not otherwise have regulatory power." 940 F.3d 1 at 75-76.

[225] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 76 (internal citations omitted).

[226] *New York State Telecom.*, 2021 U.S. Dist. LEXIS 110127, at *23.

Finally, the *NY State Telecom* District Court also ruled in favor of field preemption because the state statute at issue sought to regulate interstate[227] communications, or at least "wanders beyond the intrastate communications line," without limiting provisions, and focuses on the "nature" of the communications instead of physical locations.[228] Here, again, this reasoning does not address the fact that the FCC relieved itself of direct authority of broadband services under Title I, and therefore, by extension, such regulations, consumer protections and universal service public policies are left to the states. The *NY State Telecom* District Court's further relied on the "impossibility exception" that helps to "police the line between" the FCC's and state's authority.[229] But, the shortcoming in the *NY State Telecom* District Court's reasoning is that the "impossibility exception presupposes the existence of statutory authority to regulate; it does not serve as a substitute for that necessary delegation of power from Congress."[230] By the same token, misplaced is the reliance on 47 USC § 152, which provides for the impossibility exception, as explained above.[231]

Therefore, though a recent decision, the *NY State Telecom* District Court finds itself in direct conflict with a series of FCC-related decisions (most recently *Mozilla* in the DC Circuit Court of Appeals), related to preemption, the Commission should give little weight to assertions

[227] Some scholarship has reasoned that it is actually possible to track IP traffic, trace packets, geolocate endpoints, and better understand intrastate v interstate broadband traffic balance. Notably, telecom attorneys and engineers have a very different perspective of end-to-end, where the latter see it as a design principle that can be determined and are empirical facts. *See* Witteman, Christopher, Loyola of Los Angeles Law Review, Net Neutrality from the Ground Up at 38-41, and notes 129-132, 143, 164 (Volume 55, forthcoming) last accessed on July 23, 2021 at http://dx.doi.org/10.2139/ssrn.3822016.

[228] *New York State Telecom.*, 2021 U.S. Dist. LEXIS 110127, at *28-33.

[229] *New York State Telecom.*, 2021 U.S. Dist. LEXIS 110127, at *33 (internal citations omitted).

[230] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 78.

[231] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 76-78 (discussing at length the reasons why the impossibility exception does not ground the FCC's preemption directive).

of preemption based on these developments. Furthermore, as suggested below, the 9th Circuit's developments support state-level action.

c) Comcast's reference to NY and other arguments are not persuasive

Comcast's suggestions that preemption applies, in part, because of a federal policy of non-regulation[232] is also incorrect, as the DC Circuit finds in *Mozilla*. (See explanation above.)[233]

Comcast argues that the Commission "lacks the jurisdiction to regulate or order deployment of broadband,"[234] but this is vague. First, Comcast does not appear to be arguing that the Commission cannot investigate digital redlining or initiate other approaches beyond mandatory deployment orders to address digital redlining. Second, the Commission is in the early stages of this proceeding and given the geographic and demographic diversity in the state, the Commission should not cannot dismiss any solutions without additional consideration and concrete arguments. Relatedly, Comcast suggests that the Commission think narrowly and use existing programs to facilitate broadband service access and refrain from "restructure[ing] a successful broadband market."[235] Yet, there are hundreds of pages in the record that suggest that the California broadband market is less than successful for many communities and, because of digital redlining policies and other practices, the California broadband market is inequitable for many that are left without access to robust and affordable broadband service. The Commission

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[232] Comcast July 2, 2021, Opening Comments at 27.

[233] *Mozilla Corp. v. FCC*, 940 F.3d 1 at 80-81. The Mozilla court explained:

> "If Congress wanted Title I to vest the [Federal Communications Commission] with some form of Dormant-*Commerce Clause*-like power to negate State's authority (and soverign) authority just by washing its hands of its own regulatory authority, Congress could have done so." *Mozilla Corp. v. FCC*, 940 F.3d 1 at 83.

[234] Comcast July 2, 2021, Opening Comments at 3.

[235] Comcast July 2, 2021, Opening Comments at 4-5.

must be prepared to use all of the regulatory tools within its jurisdiction to identify and address these inequities.

d) ACLPI Outdated Arguments lack force today

ACLPI makes sweeping statements challenging the Commission's jurisdiction, but can only support its analysis with vague references to "a consistent line of FCC analysis," law journal articles,[236] and legal developments outside the Ninth Circuit.[237] ACLP states that these all "strongly" indicate that state authority over broadband services "is extremely limited" and attempts to invoke litigation concerns by stating that "formal regulatory action [is] unlikely to withstand legal challenge."[238] ACLP uses these references to suggest that state commissions "posse[s] little regulatory authority over [broadband,] inherently interstate service."[239] Though despite these confident assertions, it buries in a footnote its acknowledgement that state jurisdiction to regulate aspects of broadband service "remains an open question in California."[240]

ACLPI is right to highlight developments in California, where the California's net neutrality law no longer faces federal preemption challenges. The current advocates at the Department of Justice (DOJ) seem to now understand that properly crafted state net neutrality laws can be consistent with the "full purpose and objectives" of the FCC's ruling and the DOJ has made it clear that its intention is not to seek preemption over all state attempts to regulate

[236] One article is five years old, the other was published the same month that the DC Circuit issued its important opinion in *Mozilla Corp. v. FCC*. ACLP July 2, 2021, Opening Comments at 36, and note 81.

[237] ACLP does not name *New York State Telecommunications Association v James* from the United States District Court for the Eastern District of New York, but has been very active in telecommunication related matters in New York as well as other forums as discussed earlier in these comments.

[238] ACLP July 2, 2021, Opening Comments at 36, and note 81.

[239] ACLP July 2, 2021, Opening Comments at 36, and note 81.

[240] ACLP July 2, 2021, Opening Comments at 36, and note 81.

broadband. This change in approach was reflected recently in the decision by the DOJ to withdraw its challenge of the California net neutrality law.[241] In fact, the current Federal Communications Commission's Acting Chairwoman promptly praised the Department of Justice's actions to withdraw the lawsuit and stated:

> When the FCC, over my objection, rolled back its net neutrality policies, states like California sought to fill the void with their own laws. By taking this step, Washington is listening to the American people, who overwhelmingly support an open internet, and is chartering a source to once again make net neutrality the law of the land."[242]

Ultimately, parties' arguments that the Commission's jurisdiction over broadband service is extremely limited are not persuasive and are not rooted in current binding precedent.

B. DIVCA's Anti-discrimination and Build-out Provisions

The Commission's authority from the Digital Infrastructure and Video Competition Act of 2006[243] ("DIVCA"), includes authority over broadband services and provides a basis for the Commission to investigate and address digital redlining. The Commission's statutory mandate under DIVCA extends to broadband services and is not limited to video services. In 2006 the Legislature recognized the connections between the providers' video and broadband service offerings and explicitly designed DIVCA to increase competition for both video and broadband services "as a matter of statewide concern" and to "complement efforts to increase investment in

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[241] *United States of America v. The State of California*, Plaintiff's Notice of Dismissal, Case No. 2:18-cv-2660-JAM-DB, United States District Court, Eastern District of California, February 8, 2021 (giving notice of its voluntary dismissal of the case, after the court had ordered the parties to file a status conference statement to inform the court whether the plaintiff "intend[ed] to pursue this case further, or, whether upon review by the Biden Administration, [the plaintiff] w[ould] file a stipulation or motion to dismiss this lawsuit").

[242] Acting FCC Chairwoman Jessica Rosenworcel, "Statement of Acting Chairwoman Rosenworcel on Department of Justice Decision to Withdraw Lawsuit to Block California Net Neutrality Law," (February 8, 2021) https://docs.fcc.gov/public/attachments/DOC-369799A1.pdf.

[243] Pub. Util. Code §§5800-5970.

broadband infrastructure and to close the digital divide."[244] The Commission has similarly recognized the connection between broadband and video and its related statutory mandate in its decisions implementing DIVCA. The Commission has found that, "We will be vigilant in our efforts to enforce antidiscrimination and build-out requirements….Advanced video and broadband systems are critical to social and economic development in our state."[245] The Commission further acknowledged that its statutory mandate under DIVCA- to ensure nondiscrimination and access to video and broadband services- must go beyond "common carrier or utility regulation," to support the monitoring and enforcement of the Legislature's goals.[246] In its 2007 decision, the Commission used this authority to require additional reporting despite the industry's repeated objections.[247] It is also critical to note that G.O. 169, the Commission's implementation regulations for DIVCA broadly state that, "All California operations of a State Video Franchise Holder and its Affiliates shall be included for the purpose of applying Public Utilities Code §§ 5840, 5890, 5960 and 5940."[248] The G.O. goes on to

[244] Pub. Util. Code §5810(a)(1), (a)(2)(E).

[245] *Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implementing the Digital Infrastructure and Video Competition Act of 2006* (R.06-10-005) D.07-03-014 at p. 5, COL 91 (March 2007); D.07-10-013 (R.06-10-005) at 18, FOF 3 (October 2007) ("Periodic reporting by state video franchise holders provides important information to the Commission that it uses in fulfilling its roles under DIVCA regarding broadband deployment in California and enforcing DIVCA's non-discrimination and build-out requirements.").

[246] D. 07-10-013 (R.06-10-005) at 41-42. Rebutting industry comments suggesting that since video service providers are not public utilities or common carriers, they may not be regulated as such, and that such reporting was discussed but not adopted in the legislative process, the Commission said "[the Commission] must first look to the language that is included in the statute itself." The Commission explained that DIVCA prohibits "discrimination in addition to denial of access," and therefore it is "appropriate to require reports that allow [the Commission] to determine whether a [franchise] holder has violated the rule." *Id*.

[247] D.07-10-013 (R.06-10-005) at 42 and note 48, COL 7 ("The Commission has authority to take actions necessary to carry out its duties under DIVCA, and to that end the Commission may impose additional reporting requirements beyond those set forth in DIVCA.").

[248] GENERAL ORDER 169 Implementing the Digital Infrastructure And Video Competition Act Of 2006 (DIVCA) at Section VII (B)(1).

broadly apply DIVCA's anti-discrimination provisions explicitly on both the Holder and its Affiliates.[249] DIVCA's statutory mandate, and the Commission's implementing regulations, compel the the Commission to investigate and address any discrimination against or denial of access to service to any group of potential residential subscribers because of the residents' income in the local area.[250]

1. Investigating Discrimination Under DIVCA

The Commission has the authority to investigate whether there has been discrimination or as the ALJ states "whether Internet service providers (ISPs) are refusing to serve certain communities or neighborhoods within their service or franchise areas." While, as discussed above, the Commission has a broad statutory mandate under DIVCA to carry out the goals of this proceeding and also broad authority to address digital redlining through its police powers and Constitutional authority, the Commission's authority through DIVCA focuses on discrimination using a criteria of income levels of the local community. Specifically, PUC § 5890 prohibits a cable operator or video service provider from "discriminat[ing] against or deny[ing] access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides."[251] Here, the statute broadly defines "access" to include both video services and "two-way broadband Internet capability," stating:

> "Access" means that the holder is capable of providing video service at the household address using any technology, other than direct-to-home satellite service, *providing two-way broadband Internet capability and video programming, content, and functionality, regardless of whether any customer has ordered service* or whether the owner or landlord or other responsible person has

[249] General Order 169, Section VII (B)(1). .

[250] Other commenters have a similar view. *See generally* CETF July 2, 2021, Opening Comments at 8.

[251] Pub. Util. Code §5890(a).

> granted access to the household. If more than one technology is utilized, the technologies shall provide similar two-way broadband Internet accessibility and similar video programming."[252]

Moreover, although the statute does not require a franchise holder to provide video service outside its "wireline footprint" or that it "match the existing service area of any cable operator,"[253] nothing in the statute impedes the Commission's jurisdiction and ability to investigate areas where broadband Internet capability is deployed and available in California to determine if discriminatory behavior exists. Indeed, the data reporting requirements imposed on franchise holders and their affiliates by DIVCA reflect the intent that the Commission must review, monitor and investigate build-out practices to enforce non-discrimination and other requirements under the statute.[254] The Commission recognized this charge in its decision to implement DIVCA, highlighting that it must collect income and socioeconomic information from state franchise holders,[255] and that, if necessary, it could impose additional requirements to fulfill its duties under DIVCA.[256] In a later decision, the Commission found it necessary to impose additional reporting requirements of video subscribership to ensure that not only there was no denial of access but that there was no discrimination in violation of PUC §5890(a).[257]

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[252] Pub. Util. Code § 5890(j)(1). This same subsection also confirms that "low-income" household means residential households located within the franchise holder's "existing telephone service area" where the "average annual household income is less than thirty-five thousand dollars ($35,000) based on the United States Census Bureau estimates adjusted annually to reflect rates of change and distribution through January 1, 2007." Pub. Util. Code § 5890(j)(4).

[253] Pub. Util. Code §5890(k).

[254] Pub. Util. Code § 5960(b)(1)(A)-(C). This section includes a requirement that information be reported on whether the broadband provided by the franchise holder "utilizes wireline-based facilities or another technology." Pub. Util. Code § 5960(b)(1)(C).

[255] D. 07-03-014 (R.06-10-005) at 55-58, 141-147.

[256] D. 07-03-014 (R.06-10-005) at 152.

[257] D.07-10-013 (R.06-10-005) at 41-43.

Cal Advocates' Opening Comments in the current proceeding provide examples of how the data reporting has been utilized.[258] In 2017, the Office of Ratepayer Advocates ("ORA;" predecessor to Cal Advocates) obtained and reviewed company data and submitted its analysis to the Commission specifically about data from Comcast Cable Communication Management (Comcast) and AT&T California (AT&T) broadband access for their respective California State Video Franchise Renewal applications in 2017. ORA's report included data that the company's submitted to verify compliance pursuant to PUC § 5890(a) anti-discrimination and buildout requirements. In its letter for the Comcast renewal application, ORA explained that its analysis showed a "significant number of low income households within [Comcast] video franchise territory do not have access to Comcast's broadband service."[259] ORA further stated that within the Comcast video franchise territory, at "the county level, there is a significant percentage of low-income households among the households that do not have access to Comcast's broadband service."[260] ORA submitted a similar letter for the AT&T renewal that contains confidential information but reflects ORA findings based on AT&T's broadband availability in California, suggesting that AT&T renewal application not be granted without a schedule containing commitments for broadband build-out requirements.[261] The Public Advocates Office has since,

[258] Cal Advocates July 2, 2021, Opening Comments at Attachment A-4. See also, the Central Coast Broadband Consortium July 2, 2021, Opening Comments at 7-9 where it provides a case study using DIVCA information to then do a digital redlining analysis of some areas.

[259] Cal Advocates July 2, 2021, Opening Comments, Public Advocates Office Attachment A-4 at 20-21 (Letter from Chris Ungson, Office of Ratepayer Advocates to Cynthia Walker, CPUC Communications Division, October 31, 2017).

[260] Cal Advocates July 2, 2021, Opening Comments, Public Advocates Office Attachment A-4 at 20-21 (Letter from Chris Ungson, Office of Ratepayer Advocates to Cynthia Walker, CPUC Communications Division, October 31, 2017).

[261] Cal Advocates July 2, 2021, Opening Comments, Public Advocates Office Attachment A-3 at 15-18 (Letter from Chris Ungson, Office of Ratepayer Advocates to Michael Amato, CPUC Communications Division, January 4, 2017).

in 2020, conducted analysis with updated information for both Comcast and AT&T that the Commission should consider in this proceeding.[262]

2. Addressing Discrimination under DIVCA

The Commission must consider the various suggestions in the record, including factors beyond income, to remedy or mitigate the impacts from discriminatory practices as part of its effort to enforce relevant statutory provisions. The Commission in its order adopting provisions to enforce DIVCA, explained that the Commission "may promulgate rules only as necessary to enforce statutory provisions . . . antidiscrimination and build-out (§ 5890)."[263] The Commission has also stated its clear intent to "undertake significant monitoring for enforcement of antidiscrimination and build-out requirements."[264] Irrespective that state franchise holders are not considered public utilities, the Commission found that the statute provides clear authority to investigate and regulate practices that run afoul of the "antidiscrimination and build-out" requirements and that its investigative authority is necessary to carry out its authority to regulate in these areas.

In addition, the legislative history of DIVCA reinforces the Commission's authority to broadly investigate and enforce Section 5890. The Assembly Floor analysis of DIVCA, confirms, DIVCA's "buildout or redlining rules" are meant to prevent redlining, which it explained as follows:

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[262] Cal Advocates July 2, 2021, Opening Comments, Public Advocates Office Attachment A-1 at 2-6 (AT&T California – Video Franchise Territory Broadband Redlining Analysis 2020) (finding that 20 of 54 counties in AT&T's service territory do not have access to AT&T broadband service at 25/3 Mbps.; Public Advocates Office Attachment A-2 at 8-13 ("Comcast Cable Communications Management, LLC-Video Franchise Territory Broadband Redlining Analysis 2020").

[263] D. 07-03-014 (R.06-10-005) at 12-13, 209 (Commission may promulgate additional regulations that are, "necessary for enforcement of a specific DIVCA provision.")

[264] D. 07-03-014 (R.06-10-005) at 15, FOF 145.

> Redlining : One concern when new entrants begin providing video services is that they will choose to provide the service only to higher income neighborhoods and thus provide these areas of the state with the advantages of new technologies and competition but deny the same benefits to lower income neighborhoods, a process known as "redlining." Federal and state law prohibit redlining by requiring the local franchise authorities to assure that access to video service is not denied to any group of potential residential video subscribers based on income.[265]

Furthermore, the Assembly Floor analysis explained that the bill would "create[] new investment opportunities in broadband internet networks because these networks are needed to provide competitive video services," and would have the Commission enforce standards of the bill, "including buildout and redlining requirements."[266] The Assembly Floor Analysis also explains that the Commission will have the authority to consider a franchise holder's request to waive the deadlines for buildout and redlining rules.[267] In considering its authority under DIVCA, the Commission has recognized its charge to enforce both the build-out and redlining requirements and to use its data gathering and investigative authority, as well as its enforcement authority, to look at the franchise holders' actions and the potential for discrimination in the

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[265] AB 2987, Assembly Floor Analysis, September 5, 2006, at 8, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060AB2987 ("DIVCA Assembly Floor Analysis September 2006"). The Senate Floor Analysis further explained the reason for different requirements for companies.

> To prevent redlining, the bill sets out specific targets which different types of video service providers must meet. The requirements differ between companies because that companies that already have telephone customers have already built some of the needed network and will have very different costs in making the jump to video service and acquiring new customers than companies that must build new networks and/or have no customers today. DIVCA Assembly Floor Analysis September 2006 at 8.

[266] DIVCA Assembly Floor Analysis September 2006 at 7-8.

[267] DIVCA Assembly Floor Analysis September 2006 at 5, para. 16.

results of those actions, not their claimed intent or high level promises to serve a particular area.[268]

TURN supports the Commission's intention to critically review the state franchise holders' "actions" instead of relying on vague statements of good intentions. Yet, the Legislature also gave the Commission authority to act even as the franchise holders are planning their franchise areas so that it may prevent discrimination in the design of each service area. The Commission notes that if a state franchise holder draws its service area in a discriminatory manner, PUC Section 5890(g) "permits local governments to bring complaints concerning discrimination to the Commission," who then can "open [its] own investigation on discrimination matters"[269] and use its related investigatory procedures.[270] In a later decision modifying the 2007 DIVCA decision, the Commission recognized the argument that "economic, technical, or logistical factors could create discriminatory conditions interfering with potential customers' ability to obtain video services even if a franchise holder provides open access."[271] The Commission further explained that given the construction of Section 5890, the "Legislature

[268] D.07-03-014 (R.06-10-005) at 61, 149-153 ("Our enforcement will be based on what applicants do, not their initial intentions."); D.07-03-013 (R.06-10-005) at 35-36 (noting that dividing an entity into several state franchises could create a structural separation that would frustrate the Commissions ability to enforce PUC § 5890). Relatedly, the Commission recognized other elements may trigger discriminatory conditions interfering with potential customers' ability to obtain video services, such as economic, technical, or logistical factors. The Commission referenced comments supporting the argument that these factors may be present when a franchise holder provides open access, in support of using reporting to show anti-discrimination and factors that could interfere with customer ability to obtain service. Order Modifying Decision (D.) 07-10-013 and Denying Rehearing of the Decision as Modified, R.06-10-005, D. 10-07-050 at 46-47 (modifying D.07-03-013 at 42).

[269] D.07-03-014 (R.06-10-005) at 168.

[270] D.07-03-014 (R.06-10-005) at 176 (stating that "[g]iven current Commission practice, an investigation accordingly may include evidentiary, full panel, and public participation hearings conducted in public"). The Commission outlines the two scenarios in which the build-out or redlining requirements may be enforced, either through a complaint filed by a local government or through the Commission's own motion. D.07-03-014 (R.06-10-005) at 180-81.

[271] D. 10-07-050 (R.06-10-005) at 44, 49-50 (modifying D.07-03-013 at 4).

specifically contemplated that DIVCA would address the provisions of video services, not just the construction of facilities to make those services available," and therefore disagrees that the "only yardstick DIVCA uses to measure discrimination" is DIVCA open access requirements in the same section.[272]

The Commission can use these requirements to consider proposals to remedy or mitigate discriminatory practices or disparate impacts of redlining. The Commission in a later decision recognized that although it cannot regulate state franchise holders' "rates and terms and conditions of service," DIVCA is silent about "how [the Commission is] to regulate franchise holders in the areas where DIVCA grants [the Commission] authority, such as the prevention of discrimination."[273] Even when conducting its limited review of state franchisee holder renewals, the Commission states that it will allow for Cal Advocates (Office of Rate Payer Advocates) to provide information about adherence to 5840, which includes a requirement that the applicant agrees to comply with "a statement that the applicant will not discriminate in the provision of video or cable services as provided in Section 5890."[274] The Commission confirmed that although not considered part of the renewal process, the information may "lead to further action by the Commission apart from the renewal process."[275]

[272] D. 07-10-013 (R.06-10-005) at 44.

[273] D. 10-07-050 (R.06-10-005) at 34.

[274] Pub. Util. Code §§ 5840 (e)(1)(B)(i) and 5850; Order Instituting Rulemaking for Adoption of Amendments to a General Order and Procedures to Implement the Franchise Renewal Provisions of the Digital Infrastructure and Video Competition Act of 2006, D. 14-08-057 (R.13-05-007) Appendix at A-12.

[275] D. 14-08-057 (R.13-05-007) Appendix at A-12.

VIII. CONCLUSION

TURN believes that the comments filed in this proceeding strongly support the proposition that there is a digital redlining problem in California. The efforts of the broadband ISPs and their supporters to deflect the Commission's attention from this important policy matter fall flat. As evident from the analysis set forth in the studies cited in the ALJ Ruling, and the Commission's Network Exam, the impact of broadband ISP business decisions has resulted in a digital divide in California based on several elements, including race, ethnicity, and geography. These inequitable investment decisions have denied opportunities and benefits to residents of the affected communities. Eliminating digital redlining practices will help close the digital divide and should be the highest priority of the Commission. The digital divide will be "closed" only when all Californians have access to high-quality and affordable broadband services.

TURN continues to encourage the Commission to think broadly about its authority and responsibility to ensure that all Californians have access to high quality broadband telecommunications services, as the Legislature has directed. The COVID-19 crisis has emphasized the fundamental need for ubiquitous, affordable broadband nationwide and in California. TURN has previously outlined steps that the Commission must take to address California's digital divide.[276] However, for the digital redlining problem, TURN encourages to build a comprehensive picture to quickly address the areas with the greatest need.

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Dated: July 26, 2021

[276] See, R. 20-09-001, Comments of The Utility Reform Network and the Center for Accessible Technology on the Commission's Order Instituting Rulemaking, October 12, 2020.